EDITOR'S NOTE

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Title: William E. Brock, Secretary of Labor and Alan C. McMillan, Regional Administrator, Occupational Safety and Health Administration, Appellants
v.
Roadway Express, Inc.

Court: United States District Court for the Northern District of Georgia

Counsel for appellant: Solicitor General

Counsel for appellee: Towers,Michael C.

try	Date	Note	Proceedings and Orders
1	Feb 6 1986		Application for extension of time to docket appeal and order granting same until March 17, 1986 (Powell, February 6, 1986).
2	Mar 17 1986	G	Statement as to jurisdiction filed.
3	Apr 18 1986		Motion of appellee Roadway Express to affirm filed.
4	Apr 23 1986		DISTRIBUTED. May 15, 1986
5	May 19 1986		PROBABLE JURISDICTION NOTED.
			**********
6	Jun 27 1986		Record filed.
7	Jul 1 1986		Order extending time to file brief of appellant on the merits until July 25, 1986.
8	Jul 25 1986		Lodging received.
9	Jul 28 1986		Order extending time to file brief of appellee on the merits until September 20, 1986.
10	Jul 25 1986		Joint appendix filed.
11	Jul 25 1986		Brief amicus curiae of Teamsters for a Democratic Union filed.
12	Jul 25 1986		Brief of appellants William E. Brock, et al. filed.
13	Sep 19 1986		Brief amicus curiae of American Trucking Assoc., et al. filed.
14	Sep 19 1986		Brief amicus curiae of appellees Central Ohio Coal Co., et al. filed.
15	Sep 20 1986		Brief of appellee Roadway Express, Inc. filed.
16	Oct 6 1986		SET FOR ARGUMENT. Wednesday, December 3, 1986. (4th case) (1 hour).
17	Oct 10 1986		CIRCULATED.
18	Nov 25 1986	X	Reply brief of appellants filed.
19	Nov 25 1986		Lodging received. (10 copies).
20	Dec 3 1986		ARGUED.

85-1530

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, APPELLANTS

v.

ROADWAY EXPRESS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), which provides that the Secretary of Labor—upon a finding of "reasonable cause to believe" that an employee in the motor transportation industry was discharged in retaliation for the employee's safety complaints—"shall" order the temporary reinstatement of the employee pending a hearing regarding the reasons for the discharge, is invalid under the Due Process Clause of the Fifth Amendment because the Secretary is not required to afford the employer an evidentiary hearing before issuing the temporary reinstatement order.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued:

Constitution, statutes and regulation:

Constitution, statutes and regulation—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

WILLIAM E. BROCK, SECRETARY OF LABOR, AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
APPELLANTS

v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the district court (App., *infra*, 1a-10a) is reported at 624 F. Supp. 197. The prior order of the district court granting appellee's motion for a preliminary injunction (App., *infra*, 11a-19a) is reported at 603 F. Supp. 249. The Secretary's findings and preliminary order (App., *infra*, 20a-23a) are unreported. The recommended decision and order of the administrative law judge (App., *infra*, 29a-43a) are unreported.

JURISDICTION

The judgment of the district court (App., *infra*, 24a) was entered on November 18, 1985. The notice of appeal to this Court was filed on December 17, 1985 (App., *infra*, 25a-26a, 27a-28a). On February 6, 1986, Justice Powell issued an order extending the time within which to docket this appeal to and including March 17, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 405(a) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(a), provides:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

3. Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), provides:

> (1) Any employee who believes he has been discharged, disciplined, or otherwise discriminated against by any person in violation of subsection (a) or (b) of this section may, within one hundred and eighty days after such alleged violation occurs, file (or have filed by any person on the employee's behalf) a complaint with the Secretary of Labor alleging such discharge, discipline, or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify the person named in the complaint of the filing of the complaint.
>
> (2)(A) Within sixty days of receipt of a complaint filed under paragraph (1) of this subsection, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify the complainant and the person alleged to have committed a violation of this section of his findings. Where the Secretary of Labor has concluded that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed by subparagraph (B) of this paragraph. Thereafter, either the person alleged to have committed the violation or the complainant may, within thirty days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be expeditiously conducted. Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review. Upon the conclusion of such hearing, the Secretary of Labor shall issue a final order within one hundred and twenty days. In the interim, such proceedings may be terminated at any time on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.
>
> (B) If, in response to a complaint filed under paragraph (1) of this subsection, the Secretary of Labor determines that a violation of subsection (a) or (b) of this section has occurred, the Secretary of Labor shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, and (iii) compensatory damages. If such an

order is issued, the Secretary of Labor, at the request of the complainant may assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

STATEMENT

1. Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305, prohibits employers in the motor transportation industry from taking retaliatory measures against employees who assert their rights to safe working conditions. The statute provides that "[n]o person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" on the ground that the employee filed a complaint or otherwise instituted a proceeding "relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order" or on the ground that the employee objected for safety reasons to operating a commercial motor vehicle. 49 U.S.C App. 2305(a) and (b).[1]

An employee who "believes he has been discharged, disciplined, or otherwise discriminated against by any person" in violation of these statutory protections may file a

[1] The statute defines a "commercial motor vehicle" as a vehicle used "principally to transport passengers or cargo" that has a weight rating of ten thousand or more pounds, is designed to transport more than ten persons, or is used to transport hazardous materials. 49 U.S.C. App. 2301(1).

complaint with the Secretary of Labor (49 U.S.C. App. 2305(c)(1)).[2] Upon receipt of a complaint, the Secretary is required to "notify the person named in the complaint of the filing of the complaint" (*ibid.*). The Secretary must then investigate the complaint in order to "determine whether there is reasonable cause to believe that the complaint has merit" (49 U.S.C. App. 2305(c)(2)(A)).[3] If, as a result of the investigation, the Secretary "conclude[s] that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order" providing for (1) abatement of the retaliatory conduct, (2) reinstatement of the employee to his former position, and (3) back pay and any other compensatory damages (*ibid.*).

[2] The Secretary has delegated his authority under Section 405 to the Assistant Secretary for Occupational Safety and Health, who, in turn, has delegated this authority to the Regional Administrators of the Occupational Safety and Health Administration.

[3] The Secretary has adopted detailed written procedures governing the investigation of complaints filed by employees under Section 405. The current version of these procedures requires the Labor Department investigator to interview the complainant and encourage the complainant to identify witnesses who can support his allegations. The investigator must also "contact the [employer], notify the [employer] of the substance of the complaint and arrange to meet with the [employer] or its counsel to interview the appropriate witnesses." OSHA Instruction DIS.4A at V5 (Aug. 26, 1985). The written procedures emphasize that the investigator should obtain evidence corroborating the complainant's allegations, secure the employer's response to the allegations, and attempt to corroborate the employer's response (*id.* at V5-V7). The procedures in effect at the time of the events in this case similarly required the investigator to consult with the employer. OSHA Instruction CPL 2.45A CH-4 at X5 (Mar. 8, 1984); OSHA Instruction DIS.6 at 4, 8-9 (Dec. 12, 1983); OSHA Investigation Manual § 11(c) at V1, V13-V14 (1979).

The employee or the employer may file objections to the Secretary's findings and request a "hearing on the record," which "shall be expeditiously conducted" (49 U.S.C. App. 2305(c)(2)(A)). The statute specifically provides that the filing by the employer of objections to the Secretary's findings and a request for a hearing "shall not operate to stay any reinstatement remedy contained in the preliminary order" (*ibid.*). The hearing is held before an administrative law judge (ALJ), who issues a recommended decision that is reviewed by the Secretary. The Secretary must issue a final order within 120 days of the conclusion of the hearing; that order is subject to judicial review in the appropriate court of appeals. 49 U.S.C. App. 2305(c)(2)(A) and (d)(1).[4]

2. Appellee is a motor common carrier engaged in the interstate trucking business, and therefore is subject to the requirements of Section 405 of the Surface Transportation Assistance Act. 49 U.S.C. App. 2301(3); App., *infra*, 1a, 20a, 46a. On November 22, 1983, appellee discharged Jerry Hufstetler, one of its truck drivers, allegedly because Hufstetler had committed an act of dishonesty; appellee asserted that Hufstetler intentionally disabled several of the lights on his truck, thereby creating a false breakdown. Hufstetler filed a grievance under his union contract claiming that he had been fired in retaliation for his repeated safety-related requests for repairs to his truck. The first arbitration panel could not reach a decision regarding the grievance; the second panel rejected Hufstetler's claim. App., *infra,* 1a-2a, 21a, 47a-48a.

Hufstetler next filed a complaint with the Secretary alleging that he had been discharged in violation of Section 405 of the Surface Transportation Assistance Act because his discharge was in retaliation for his requests for

[4] If neither the employer nor the employee requests a hearing, "the preliminary order [is] deemed a final order which is not subject to judicial review" (49 U.S.C. App. 2305(c)(2)(A)).

safety repairs. The Secretary conducted an investigation of Hufstetler's allegations, and verified the allegations "through credible, independent evidence." App., *infra,* 44a-45a. In the course of the investigation, appellee was afforded "the opportunity to fully state and support [its] positions" (*id.* at 45a). Appellee submitted a "written position statement with supporting affidavits explaining the circumstances of the discharge," and appellee's attorneys orally presented its views at a meeting with Labor Department officials. *Id.* at 49a; Complaint ¶¶ 11, 13.

After an 11-month investigation, the Secretary concluded that there was reasonable cause to believe that appellee had discharged Hufstetler in violation of Section 405, and issued a preliminary order directing appellee to reinstate Hufstetler (App., *infra*, 3a, 20a-23a). The Secretary found that "[Hufstetler] had a two year history of bringing vehicle safety problems to the attention of [appellee] and had complained to [the Department of Transportation] and to elected public officials. These complaints constitute protected activity under the [Surface Transportation Assistance] Act" (*id.* at 22a). The Secretary further found that "[appellee] had warned [Hufstetler] and threatened to get him due to his excessive breakdowns due to [Hufstetler's] recognition of safety violations" and that "[appellee] had threatened to do anything [it] could to catch [Hufstetler] doing something wrong, to get rid of him" (*id.* at 21a, 22a).

With respect to appellee's allegation that Hufstetler had been dishonest, the Secretary determined that "[appellee's] evidence to support the discharge is conjecture. [Hufstetler] has presented evidence to support his innocence" (App., *infra*, 21a). Based on these facts, the Secretary concluded that "[appellee's] termination of [Hufstetler's] employment was discriminatorily motivated by [Hufstetler's] protected activity" (*id.* at 22a), and

ordered appellee "to immediately offer reinstatement to [Hufstetler]," to compensate Hufstetler with back pay, and "to expunge from [Hufstetler's] personnel records any adverse references to his discharge or any protected activity" (*id.* at 23a).

3. On February 1, 1985—11 days after the Secretary's issuance of the preliminary order—appellee commenced this action in the United States District Court for the Northern District of Georgia seeking an injunction against the enforcement of the Secretary's order and a declaratory judgment that the Secretary's order was unconstitutional. Appellee claimed that the issuance of the reinstatement order without a prior "evidentiary hearing" violated its due process rights. Complaint ¶¶ 19, 22. The district court issued a preliminary injunction barring enforcement of the Secretary's reinstatement order. App., *infra*, 11a-19a.[5]

On November 18, 1985, the district court issued an order granting appellee's motion for summary judgment (App., *infra*, 1a-10a). The court declared Section 405(c)(2)(A) "unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing" and entered a permanent injunction "restrain[ing] and enjoin[ing] [appellants] from further

[5] Appellee also filed objections to the Secretary's findings and a request for an on-the-record hearing pursuant to 49 U.S.C. App. 2305(c)(2)(A). The hearing was held before an administrative law judge on March 26-29, 1985, and the ALJ issued his recommended decision and order on October 30, 1985 (App., *infra*, 29a-43a). The ALJ observed that Hufstetler had filed numerous safety-related complaints (*id.* at 32a-35a, 39a-41a), and found that "[t]he record is replete with many statements by [appellee's] supervisors demonstrating their animus toward [Hufstetler] as a result of his engaging in protected activities. The issuance of warning letters to [Hufstetler], while other employees were not reprimanded for similar acts, and the acrimonious statements cause the conclusion that the discharge had a retaliatory motive" (*id.* at 41a). The ALJ further found that the evidence did not indicate that Hufstetler was discharged for a reason other than his safety-related activities (*id.* at 41a-42a).

issuance of preliminary orders of reinstatement * * * without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process" (*id.* at 9a).[6]

The district court observed that in order to ascertain the requirements of due process it is necessary to consider "the private interest affected by the government's action; the risk of an erroneous deprivation of such interest through the procedures used; and the government's interest, including the function involved and the administrative and fiscal burdens that the additional procedural requirement would entail" (App., *infra*, 6a). The court found that appellee had "important interests in not being compelled to reinstate an employee discharged for wrongful conduct" (*ibid.*), noting that reinstatement of an unsatisfactory employee could undermine discipline and morale and " 'ultimately impair the efficiency of an office or agency.' " *Id.* at 7a, quoting *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693, 703 (6th Cir. 1985).

The court further found that "the procedures used by [the Department of Labor] were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility. An evidentiary hearing, prior to mandatory reinstatement, would clearly strengthen the reliability of the procedures and the ultimate decision, and hedge against the risk of erroneous deprivation" (App., *infra*, 8a (citation omitted)).[7] With respect to the government interest, the court concluded that "[a]lthough the governmental interests in promoting

[6] The district court also held that appellee was not required to exhaust its administrative remedies (App., *infra*, 4a-5a), that the controversy between the parties was not moot (*id.* at 5a), and that the district court did not lack jurisdiction over appellee's claim (*ibid.*). We do not seek review of these determinations.

[7] The court noted (App., *infra*, 7a) that the Secretary "failed to make available the names and statements of witnesses upon which [the] decision was based."

safety on the highways and prohibiting retaliatory discharge are indeed valid, [the Department of Labor] has failed to show any compelling considerations which necessitate postponing the hearing" (*ibid.*). It found that "the administrative or fiscal burdens attendant to such a hearing prior to reinstatement would be negligible" because the statute provides for a postreinstatement hearing (*ibid.*).

Weighing these considerations, the court found that "[t]o the extent that the statute fails to provide employers with a meaningful opportunity to be heard, it fails to meet the requirements of due process. Such deficiency may only be remedied by conducting a hearing, prior to an order of reinstatement, whereby the parties are given a meaningful opportunity to be heard prior to the Secretary's decision" (App., *infra*, 9a). The court concluded that the requirements of due process could be satisfied only through a prereinstatement "evidentiary hearing" at which the employer is afforded "at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

In a sweeping injunctive order, the district court has invalidated a clearly articulated element of Congress's plan to enforce compliance with safety standards in the motor transportation industry. Congress concluded that safety complaints by motor carrier employees would be a significant source of information about motor carriers' compliance with safety standards. It therefore expressly protected such employees against reprisals for safety-related activity, and specifically provided that an employee discharged in violation of this statutory protection would be reinstated on a temporary basis as soon as the Secretary found reasonable cause to support his claim of retaliatory discharge. The district court's requirement of an "evidentiary hearing" prior to the temporary reinstatement of an

unlawfully discharged employee plainly interferes with the protection Congress has accorded employees who report safety violations.

Moreover, the district court's decision rests upon an erroneous view of both the requirements of due process and the regulatory scheme at issue here. This Court repeatedly has held that "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action," and that "notice and an opportunity to respond" are all that is required in such circumstances. *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 12 (citation omitted). The district court ignored this settled rule in holding that the Secretary must conduct an "evidentiary hearing" before issuing a preliminary reinstatement order, even though the statute expressly requires a prompt postreinstatement hearing. The district court also ignored the fact that the procedures followed by the Secretary in this case—which reflect the Secretary's written policy regarding the enforcement of Section 405—afforded appellee notice and an opportunity to respond prior to the issuance of the preliminary reinstatement order. Congress's scheme thus plainly comports with the requirements of due process; review by this Court therefore is clearly warranted.

1. The threshold question in assessing a procedural due process claim such as appellee's claim here is whether the challenged government action resulted in the deprivation of a liberty or property interest protected by the Due Process Clause. *Loudermill*, slip op. 4-5; *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972). We do not dispute that the Secretary's order would have deprived appellee of such a property interest. The order required appellee to rehire its former employee; it therefore would have resulted in a deprivation of property because appellee would have been required to pay the salary of the rehired employee during the term of his reinstatement.

The issue here, therefore, is to ascertain the procedures that the Due Process Clause requires before the Secretary may order the temporary reinstatement of an employee pending further review: "Once it is determined that due process applies, the question remains what process is due" (*Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). Under this Court's decisions, "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); see also *Loudermill*, slip op. 9; *Goss* v. *Lopez*, 419 U.S. 565, 578-580 (1975).

We certainly do not dispute that an employer should be afforded an opportunity to be heard before the employer may be required to reinstate an employee on a temporary basis pending further review of the matter. In our view, however, the district court erred in concluding that an evidentiary hearing—complete with an opportunity to confront and cross-examine witnessess—must be held before the issuance of such a temporary reinstatement order. This Court's decisions make clear that it is sufficient for the Secretary to afford an employer notice and an opportunity to respond to the allegation of an unlawful discharge before issuing a temporary reinstatement order, so long as a prompt postdeprivation hearing also is available.

a. This Court has considered in a variety of other contexts the question presented here—whether the Due Process Clause requires a predeprivation evidentiary hearing

when a postdeprivation hearing is provided to the person deprived of the property interest. The " 'ordinary principle' " established by the Court's decisions is that " 'something less than an evidentiary hearing is sufficient prior to adverse administrative action.' " *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979) (citation omitted); see also *Loudermill*, slip op. 8-9, 12; *Mathews*, 424 U.S. at 343. Thus, "[i]n only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse government action" (*Loudermill*, slip op. 12). The Court otherwise has concluded that due process is satisfied so long as the party to be deprived of the property interest is provided with notice of the case against him and an opportunity to present his side of the story. *Ibid.*; *Barry* v. *Barchi*, 443 U.S. 55, 63-64 (1979); *Mackey* v. *Montrym*, 443 U.S. at 13-15; *Dixon* v. *Love*, 431 U.S. 105, 112-113 (1977); *Mathews*, 424 U.S. at 332-349; see also *Signet Construction Corp.* v. *Borg*, 775 F.2d 486, 491-492 (2d Cir. 1985).

For example, in *Barry* v. *Barchi*, *supra*, the Court held that an evidentiary hearing was not required prior to the temporary suspension of a horse trainer suspected of complicity in the drugging of a race horse. The Court stated that "the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging" (443 U.S. at 64). The Court held that the finding of the testing official that the horse was drugged, combined with a state evidentiary presumption, was sufficient to establish probable cause. It noted that the trainer "was given more than one opportunity to present his side of the story to the State's investigators" (*id.* at 65), and concluded that these procedures "sufficed for the purposes of probable cause and interim suspension" (*id.* at 66). Thus, so long as a prompt postdeprivation hearing is available under the relevant

statutory scheme, the Court "generally [has] required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be" (*Mackey* v. *Montrym,* 443 U.S. at 13).

An assessment of the factors identified by the Court in *Mathews* makes clear that this general rule regarding predeprivation process applies in the present context. First, the employer's interest, although significant, is not more substantial than the interests at issue in the Court's previous cases concerning predeprivation process. Thus, despite "the severity of depriving a person of the means of livelihood," the Court has held that the termination of a government employee need only be preceded by notice and an opportunity to respond (*Loudermill,* slip op. 9). The same is true of the temporary revocation of a license required in order to practice one's livelihood (*Barry* v. *Barchi, supra*), and the termination of disability benefits (*Mathews* v. *Eldridge, supra*).

Here, appellee would be required to pay the salary of a reinstated employee pending the outcome of the postdeprivation hearing, but it would receive "the benefit of the employee's labors" (*Loudermill*, slip op. 11). Thus, the deprivation of property is limited by the receipt of value in return for the expenditure of funds. The district court's statement (App., *infra,* 7a) that the reinstatement of an employee could adversely affect office morale does not provide sufficient grounds for requiring a greater degree of procedural protection in the present context. The government may terminate an employee's interest in continued employment after supplying the employee with notice and an opportunity to respond, and the same process is sufficient to protect the employer's correlative interest in removing unsatisfactory employees. Cf. *Loudermill,* slip op. 9-11.[8]

[8] The Court's determination in *Goldberg* v. *Kelly, supra,* that an evidentiary hearing was required prior to the termination of welfare benefits rested on its conclusion that "termination of [welfare assistance] pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate" (397 U.S. at 264). Appellee cannot claim that the temporary reinstatement of a discharged employee will place it in similar desperate straits.

Second, the government interest here is quite weighty. In enacting Section 405, Congress was concerned about "the increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (summary of safety provisions submitted by Sen. Danforth). The anti-retaliation provision "underscore[s] the strong Congressional policy that persons reporting health and safety violations should not suffer because of this action" (*ibid.*). This Court has recognized in other contexts that such anti-retaliation provisions are important means of promoting enforcement of regulatory standards. *NLRB* v. *Scrivener,* 405 U.S. 117, 121-124 (1972); *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1960); see also *Donovan* v. *Square D Co.,* 709 F.2d 335, 338 (5th Cir. 1983); *Phillips* v. *Interior Board of Mine Operations Appeals,* 500 F.2d 772, 778, 781 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975).

Congress plainly included temporary reinstatement authority in Section 405 because it believed that the availability of prompt reinstatement would encourage employees to report safety violations. Requiring the Secretary to afford employers an evidentiary hearing prior to temporary reinstatement would interfere with this congressional scheme, resulting in longer periods of unemployment for discharged employees. Since an employee is not likely to be financially able to withstand a long period of unemployment or reduced income (see *Loudermill*, slip op. 9), the elimination of temporary reinstatement necessarily will reduce an employee's willingness to engage in safety-related activity. The rule

adopted by the district court thus discourages the filing of safety complaints by employees and, as a result, undermines Congress's goal of promoting safety in commercial vehicle operations. The district court's decision cannot be squared with this Court's repeated conclusion that the government interest in promoting safety is sufficient to justify limited predeprivation procedures under the Due Process Clause. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 299-303 (1981); *Dixon* v. *Love*, 431 U.S. at 114-115; *Mackey* v. *Montrym*, 443 U.S. at 17-18.

Moreover, requiring a prereinstatement evidentiary hearing would impose additional fiscal and administrative burdens upon the government. The number of hearings undoubtedly would increase under such a rule because an employer would make use of the hearing and any possible appeal to prolong the status quo; "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews,* 424 U.S. at 347; see also *Dixon* v. *Love,* 431 U.S. at 114.

With respect to the third factor identified in *Mathews,* the risk of an erroneous decision, the Labor Department's procedures require that an employer be afforded notice and an opportunity to respond in order to diminish the risk of an erroneous temporary reinstatement order. See page 5 & note 3, *supra.* There is no basis for concluding that additional procedures are required at the prereinstatement stage. Indeed, faced with a due process challenge to the termination of a government employee—involving the identical factual inquiry into the reasons for a discharge—the Court has held that due process does not require a pretermination evidentiary hearing. *Loudermill*, slip op. 12; *Arnett* v. *Kennedy,* 416 U.S. 134, 151-158 (1974) (plurality opinion); *id.* at 167-171 (opinion of Powell, J.).

The district court stated that an evidentiary hearing was needed because dismissals often involve "disputed issues of fact and credibility" (App., *infra*, 8a). But this Court in *Loudermill* acknowledged that "[d]ismissals for cause will often involve factual disputes" (slip op. 9), and concluded that only notice and an opportunity to respond, not an evidentiary hearing, is required prior to the termination of a government employee (*id.* at 12). Here, as in the public employment context, the predeprivation hearing "need not definitely resolve the propriety of the [government action]. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Ibid.*; see also *Barry* v. *Barchi,* 443 U.S. at 65 (the state "need not postpone a suspension [of a horse trainer's license] pending an adversary hearing to resolve questions of credibility and conflicts in the evidence. At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements"); *Mackey* v. *Montrym,* 443 U.S. at 15; *Gerstein* v. *Pugh,* 420 U.S. 103, 119-125 (1975).

Of course, the Due Process Clause requires that the final disposition of the case be preceded by a full and prompt postreinstatement hearing. Thus, this Court has indicated that "[a]t some point, a delay in the [post-deprivation] hearing would become a constitutional violation." *Loudermill,* slip op. 13; *Barry* v. *Barchi*, 443 U.S. at 66. But here the statute itself provides for the necessary postreinstatement procedural protections. Section 405 states that the postreinstatement hearing "shall be expeditiously conducted" and sets a time limit of 120 days after the conclusion of the hearing for issuance of the

post-hearing order. 49 U.S.C. App. 2305(c)(2)(A); see page 6, *supra*. The statutory scheme therefore accords fully with the requirements of due process.[9]

In the final analysis, the Court must determine "when, under our constitutional system, judicial-type procedures must be imposed upon adminstrative action to assure fairness" (*Mathews,* 424 U.S. at 348). In assessing what process is due prior to the issuance of a temporary reinstatement order, substantial weight should be given to the reasonable judgment of Congress that an employer subject to Section 405 should bear the expenses associated with a reasonably disputed discharge pending a final disposition on the merits. *Mathews,* 424 U.S. at 349; see also *Mackey* v. *Montrym,* 443 U.S. at 17.

b. Appellee was accorded all of the predeprivation process required by the Due Process Clause. It is undisputed that the Secretary complied with the statutory directive to "notify the person named in the complaint of the filing of the complaint" (49 U.S.C. App. 2305(c)(1)). Appellee obviously was aware of the relevant factual issues; it had litigated the propriety of the Huffstetler discharge twice before in contract grievance proceedings.[10]

The Secretary's thorough 11-month investigation supplied the "initial check against mistaken decisions" required by the Due Process Clause (*Loudermill*, slip op.

[9] In the present case, appellee never was subjected to a deprivation of property because enforcement of the Secretary's order was enjoined by the district court; appellee accordingly cannot complain of any delay in the statutory hearing. This Court therefore need not consider the permissibility of the length of the delay in this case.

[10] Appellee noted that it was deprived of access to the witness statements and the identities of the witnesses (App., *infra*, 49a). The Secretary declined to disclose the statements on confidentiality grounds. In view of the previous litigation concerning this discharge, however, appellee cannot contend that it was unaware of the parameters of the factual dispute.

12). Moreover, appellee received two opportunities to submit its side of the story prior to the issuance of the Secretary's order. First, appellee supplied the Secretary with a written position paper—accompanied by supporting affidavits—regarding the events surrounding the discharge. Second, appellee's attorneys met with Labor Department officials to present appellee's view of the case. App., *infra*, 45a, 49a; page 7, *supra*. Thus, appellee received the requisite "notice and * * * opportunity to respond" (*Loudermill*, slip op. 12).

The district court's contrary conclusion rests upon its apparent view that "a meaningful opportunity to be heard" automatically requires an evidentiary hearing (see App., *infra*, 9a). In fact, this Court has observed that an evidentiary hearing is "neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Mathews*, 424 U.S. at 348; see also *Mackey* v. *Montrym*, 443 U.S. at 13; *Goss* v. *Lopez*, 419 U.S. at 583. As we have discussed, the general rule is that such a hearing is not required prior to a temporary deprivation of property, so long as a prompt postdeprivation hearing is available under the relevant statutory scheme. The district court did not discuss any reasons that this general rule should not apply in the present context.[11]

2. The question presented in this case clearly warrants review by this Court. The district court's invalidation on constitutional grounds of the temporary reinstatement remedy set forth in Section 405 substantially alters the protection conferred upon motor carrier employees by Congress. Moreover, the effect of the decision below is not

[11] The district court particularly did not explain the reason that it deemed the disclosure of the identity of witnesses and an opportunity for cross examination necessary in this context, even though this Court typically has not found such procedures to be constitutionally required prior to temporary deprivations of property.

limited to the present case. Although appellee did not request certification of a class, the district court's injunction by its terms does not bar only the issuance of temporary reinstatement orders against appellee; it appears to bar the Secretary from issuing a temporary reinstatement order against *any employer*. This Court, however, has made clear that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff. *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 410 (1945); cf. *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (Mar. 27, 1985), slip op. 10. A district court may not correct putatively unconstitutional action wherever it may occur. Its role is limited to taking whatever steps are necessary to provide full relief to those who have invoked its jurisdiction. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803); cf. *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982).

Thus, because the district court did not certify a plaintiff class, and because no individuals sought to join the action, there is no justification here for nationwide injunctive relief. Of course, once this Court has addressed the merits of appellee's claim, the issue will be resolved for appellants, appellee, and all employers. As a result of the district court's overbroad injunction, however, if this Court should for some reason decline to note probable jurisdiction, the Secretary would never again be able to utilize the statutory temporary reinstatement remedy, and this Court would not have another opportunity to review the correctness of the constitutional analysis applied by the district court.

In addition, the constitutional question decided by the district court does not arise only in the present context. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), bars mine operators from discriminating

against miners in retaliation for the miners' health or safety complaints. The statute provides that if the Secretary of Labor finds that a complaint alleging such retaliation was not "frivolously brought," the Secretary may apply to the Federal Mine Safety and Health Review Commission for an order requiring the reinstatement of the miner (30 U.S.C. 815(c)(2)). The Commission's regulations closely resemble the procedures set forth in Section 405, authorizing the issuance of a temporary reinstatement order on the basis of the Secretary's application, to be followed by a prompt postreinstatement evidentiary hearing. See 29 C.F.R. 2700.44. The Sixth Circuit recently held that the issuance of a temporary reinstatement order without a prior evidentiary hearing violates the mine operator's procedural due process rights. *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (6th Cir. 1985). Thus, the question presented in this case is closely related to the constitutionality of the temporary reinstatement remedy under this separate federal program. For these reasons, review by this Court plainly is warranted.

CONCLUSION

Probable jurisdiction should be noted.
Respectfully submitted.

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MARCH 1986

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION FOUR, U.S. DEPARTMENT OF LABOR

ORDER

The above-styled matter is presently before the court on plaintiff's motion for summary judgment. Plaintiff attached to its motion for summary judgment a "Statement of Material Facts as to which there is No Genuine Issue to be Tried", as required by L.R. 220-5(b)(1) (N.D. Ga.). The defendant neither responded to nor controverted those facts. Thus, Roadway's Statement of Facts shall be deemed admitted. L.R. 220-5(b)(2) (N.D. Ga.).

STATEMENT OF FACTS

Plaintiff Roadway Express, Inc. ("Roadway") is a common motor carrier, engaged in interstate trucking through the operation of commercial motor vehicles, which are used to transport cargo.

On November 22, 1983, Roadway discharged employee Jerry Hufstetler for an alleged act of dishonesty. Soon thereafter, Hufstetler filed a grievance, pursuant to the

the provisions of the National Master Freight Agreement ("NMFA"), a collective bargaining agreement made between Roadway and the Teamsters Local Union No. 528. Hufstetler contended that he was dismissed in retaliation for his reporting of violations of commercial motor vehicles rules and regulations.

On December 19, 1983, Hufstetler's grievance was heard before an arbitration panel established under the terms of the NMFA. That panel deadlocked, and, as dictated by the NMFA, the case was referred to a second level arbitration panel. The panel was composed of an equal number of representatives from a company and a union, none of which was a representative of the plaintiff. After considering evidence presented by both Hufstetler and Roadway, the second panel rejected Hufstetler's contentions and sustained his discharge for an act of dishonesty.

Hufstetler filed subsequently a complaint with the United States Department of Labor ("DOL"), alleging that he had been discharged without just cause, in violation of the NMFA and section 405 of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 2305, which prohibits, *inter alia,* retaliatory discharge for the reporting of safety violations.

Pursuant to 49 U.S.C. § 2305(c)(2)(A), DOL investigated Hufstetler's complaint. The procedures utilized included a field investigation by an employee of DOL, a review of the investigator's report by a regional supervisory investigator, and, where the supervisor found the complaint meritorious, review by the Occupational Safety and Health Administration's regional administrator.

During the investigation, Roadway submitted, as requested, a written position statement explaining the circumstances of the discharge. However, Roadway was denied access to confidential statements of witnesses, and was denied the names of those individuals from whom statements were taken. Roadway thereby informed DOL

that any preliminary order requiring Hufstetler's reinstatement, prior to an evidentiary hearing, would constitute a denial of due process as guaranteed by the Fifth Amendment to the United States Constitution.

DOL determined, after eleven months of investigation, that there was reasonable cause to believe that Hufstetler was discharged in violation of 49 U.S.C. § 2305. On January 21, 1985, the Secretary of DOL thereby issued a preliminary order, pursuant to 49 U.S.C. § 2305(c)(A), which required, *inter alia,* that Roadway immediately reinstate Hufstetler to his former position.

Prior to the issuance of the preliminary order, DOL did not conduct an evidentiary hearing to resolve disputed factual issues which were raised by the evidence. However, under 49 U.S.C. § 2305(c)(2)(A), DOL was not so required. It is this alleged infirmity in the statute which is the crux of this litigation.

Roadway filed suit on February 1, 1985, challenging the provisions of 49 U.S.C. § 2305(c)(2)(A), and seeking injunctive and declaratory relief. In addition to seeking relief from this court on constitutional grounds, Roadway filed, before an Administrative Law Judge ("ALJ"), objections to that part of DOL's order which held that Hufstetler was wrongfully discharged. The ALJ has not yet rendered a decision as to the merits of Hufstetler's discharge.

On February 11, 1985, this court granted Roadway's motion for preliminary injunction. *Roadway Express, Inc. v. Donovan*, 603 F. Supp. 249 (N.D. Ga. 1985). The court found that Roadway proved the four elements necessary for the issuance of a preliminary injunction. Specifically, the court found preliminary injunctive relief warranted because Roadway showed: 1) a substantial likelihood of success on the merits, 2) the possibility of irreparable harm, 3) a comparatively greater possibility of harm than that of DOL, and 4) no adverse effect to the public in-

terest. *Roadway*, 603 F. Supp. at 252-53. The court thereby restrained DOL from enforcing that portion of its January 21 preliminary order which required Roadway to temporarily reinstate Hufstetler without benefit of an evidentiary hearing.

Following this court's entry of a preliminary injunction, Roadway moved for summary judgment, seeking a final order of injunctive and declarative relief.

JURISDICTIONAL ISSUES

DOL contends that summary judgment is not appropriate inasmuch as Roadway has failed to exhaust available administrative remedies. DOL alleges that the resolution of the constitutional question is dependent upon the compilation of an appropriate record for review pursuant to administrative procedures.

Roadway's complaint is based upon the premise that there is no available administrative remedy prior to DOL's order. It is this prehearing deprivation of a property right for which Roadway seeks relief.

It is well-established that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures." *Califano v. Sanders*, 430 U.S. 99, 109, 97 S. Ct. 980, 986 (1977). This is especially true when an adequate factual record has been compiled and the special expertise of the administrative agency is unnecessary for resolution of the collateral constitutional issues. *See, McKart v. United States*, 395 U.S. 185, 193-94, 89 S. Ct. 1657, 1662-63 (1969); *Southern Ohio Coal Co. v. Donovan*, No. 84-3910, slip op. (6th Cir. Oct. 2, 1985). Thus, inasmuch as Roadway's due process claim is collateral to the substantive claims presently before the ALJ, and the expertise of the administrative agency is, in this instance, unavailable, jurisdiction in the district court is warranted. *Mathews v. Eldridge*, 424 U.S. 319, 330-32, 96

S.Ct. 893, 900-01 (1976); *Cherry v. Heckler*, 760 F.2d 1186, 1190 (11th Cir. 1985); *Southern Ohio Coal*, slip op. at 14-16.

Additionally, it is clear that "this issue is live and in dispute between the parties. The plaintiff remains in the [trucking] business and continues to be exposed to procedures which, it alleges, deprive it of due process. The Court is satisfied that this action continues to present an 'actual controversy' that is appropriate for declaratory relief." *Southern Ohio Coal v. Donovan*, 593 F. Supp. 1014, 1021 (S.D. Ohio 1984). *See, Powell v. McCormack*, 395 U.S. 486, 517-18, 89 S. Ct. 1944, 1961-62 (1969). The governmental policy is definite, settled, and presently affecting Roadway's interests; hence, declaratory relief in the district court is appropriate. *Florida Board of Business Regulation v. National Labor Relations Board*, 605 F.2d 916, 919 (5th Cir. 1979).

In the alternative, DOL contends that the Court of Appeals rather than the district court has jurisdiction to review an order issued pursuant to 49 U.S.C. § 2305(c).

However, the statutory scheme is clear. 49 U.S.C. § 2305(d)(1) provides, in part: "Any person adversely affected or aggrieved by an order issued *after a hearing* under subsection (c) of this section may obtain review of the order in the United States Court of Appeals for the circuit in which the violation. . . allegedly occurred. . . [emphasis supplied]." Thus, this code section grants the Court of Appeals appellate jurisdiction only of substantive claims following a hearing on the merits, and is therefore inapposite to the matter before this court.

Having found that jurisdiction is properly invoked in this court, the sole issue remains: whether 49 U.S.C. § 2305(c)(2)(A), which requires, prior to an evidentiary hearing, immediate reinstatement of discharged employees, upon the Secretary's finding of wrongful discharge, is unconstitutional and violative of the Fifth Amendment to the United States Constitution.

PROCEDURAL DUE PROCESS

The Fifth Amendment to the United States Constitution assures that no person shall be deprived of property without due process of law. An essential and fundamental requirement of due process is that notice and an opportunity to be heard *precede* deprivation of a significant property interest, *Mullance v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656 (1950), except for extraordinary situations where important governmental interests justify postponing the hearing until after deprivation. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786 (1971); *see Cleveland Board of Education v. Loudermill*, ____ U.S. ____ 105 S. Ct. 1487, 1493 (1985).

The parties agree that a balancing test, as prescribed and applied by the United States Supreme Court in *Mathews v. Eldridge*, is necessary for determining whether procedures used in the deprivation of a property right comport with the requirements of due process. Thus, in determining the constitutionality of 49 U.S.C. § 2305(c)(2)(A), the court must consider: the private interest affected by the government's action; the risk of an erroneous deprivation of such interest through the procedures used; and, the government's interest, including the function involved and the administrative and fiscal burdens that the additional procedural requirement would entail. *Mathews*, 424 U.S. at 335.

The private interest: This court, on Roadway's motion for preliminary injunction, found that Roadway has important interests in not being compelled to reinstate an employee discharged for wrongful conduct and in upholding the arbitration provisions of its bargaining agreement. DOL argues nevertheless, that Roadway's interests are insubstantial, inasmuch as the statute requires that a post-reinstatement hearing be "expeditiously con-

ducted". DOL contends that Roadway would be subject to, at most, a 120 day reinstatement order without benefit of hearing.

In *Southern Ohio Coal*, slip op., the Sixth Circuit Court of Appeals addressed a provision of the Federal Mine Safety and Health Act which required pre-hearing reinstatement in the same manner as the statute involved herein. The court held that an order requiring reinstatement for five days prior to a hearing violated the procedural due process rights of the employer. The Sixth Circuit reasoned that "[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." *Southern Ohio Coal*, slip op. at 18 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168, 94 S. Ct. 1633 (Powell, J. concurring) (1974).

In this instance, the arbitration panel, after a lengthy hearing, sustained Hufstetler's discharge for an act of dishonesty. The statutory scheme however, required Roadway to reinstate, for possibly a four-month period, an arguably unsatisfactory employee, in violation of its collective bargaining agreement and at the expense of innocent employees. Certainly, Roadway's interests in not doing so are substantial.

The risk of erroneous deprivation: The court found previously a clear risk of erroneous deprivation, inasmuch as the credibility and veracity of witnessess was not available to Roadway for scrutiny and cross-examination. *Roadway*, 603 F. Supp. at 252.

During its investigation, DOL requested and received from Roadway a written position statement, but failed to make available the names and statements of witnesses upon which its decision was based. "[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the [employer] to mold his argument to the

issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many [discharge] proceedings, written submissions are a wholly unsatisfactory basis for decision." *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021 (1970). *See also Mathews*, 424 U.S. at 343-44.

Dismissals for cause often, as in this case, involve disputed issues of fact. *Loudermill*, 105 S. Ct. at 1494. Even where the facts are not in dispute, the appropriateness of the discharge might be questioned, and the only meaningful opportunity to be heard is before the reinstatement order. *Id.* Thus, the procedures used by DOL were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility. *Southern Ohio Coal.* slip op. at 19. An evidentiary hearing, prior to mandatory reinstatement, would clearly strengthen the reliability of the procedures and the ultimate decision, and hedge against the risk of erroneous deprivation.

The governmental interest: This court concluded on motion for preliminary injunction that the governmental interest in protecting employees from retaliatory discharge would not be impaired by requiring a hearing prior to reinstatement. *Roadway*, 603 F. Supp. at 252.

Although the governmental interests in promoting safety on the highways and prohibiting retaliatory discharge are indeed valid, DOL has failed to show any compelling considerations which necessitate postponing the hearing.

Inasmuch as the statute requires presently that a hearing be "expeditiously conducted" after reinstatement, the administrative or fiscal burdens attendant to such a hearing prior to reinstatement would be negligible. *Loudermill*, 105 S. Ct. at 1495; *Southern Ohio Coal*, slip op. at 17.

The court notes that a full evidentiary hearing prior to reinstatement is not required. *Mathews*, 424 U.S. at 343. Rather, it is sufficient that an employer be given, at

minimum, an opportunity to present his side and a chance to confront and cross examine witnesses. *Southern Ohio Coal*, slip op. at 21.

CONCLUSION

Considering the private and governmental interests involved, and the present risk of erroneous deprivation, the court concludes that the statutory procedures utilized by DOL do not conform to the dictates of due process. To the extent that the statute fails to provide employers with a meaningful opportunity to be heard, it fails to meet the requirements of due process. Such deficiency may only be remedied by conducting a hearing, prior to an order of reinstatement, whereby the parties are given a meaningful opportunity to be heard prior to the Secretary's decision.

In summary, the court determines that the plaintiff's motion for summary judgment is meritorious, and the motion is hereby granted. It is the judgment of this court and it is declared that the Secretary's preliminary order of January 21, 1985 is violative of the requirements of procedural due process to the extent that it requires the plaintiff to temporarily reinstate Hufstetler prior to an evidentiary hearing, and that portion is therefore void. It is declared further that 29 U.S.C. § 2305(c)(2)(A) is unconstitutional and void to the extent that it empowers defendants to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process. Accordingly, the defendants, and any of their officers, agents, and anyone acting in active concert therewith, are hereby restrained and enjoined from further issuance of preliminary orders of reinstatement pursuant to 49 U.S.C. § 2305(c)(2)(A), without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process under the Fifth Amendment to the United States Constitution.

SO ORDERED, this 18 day of November, 1985.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
Judge,
UNITED STATES DISTRICT COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC.

v.

RAYMOND J. DONOVAN AND ALAN C. MCMILLAN

ORDER

The above-styled action is presently before the court on the plaintiff's motion for a temporary restraining order or for a preliminary injunction to order the defendants to withdraw that portion of the Secretary of Labor's preliminary order which requires the plaintiff to reinstate previously discharged employee Jerry W. Hufstetler. The plaintiff contends that the preliminary order is unconstitutional because it violates the plaintiff's right to procedural due process as guaranteed by the Fifth Amendment to the United States Constitution. After a hearing the parties have agreed that the present motion be treated as a motion for preliminary injunctive relief.

Prior to his dismissal on November 22, 1983, Jerry Hufstetler worked as a driver for the plaintiff. He was dismissed for allegedly intentionally creating a breakdown of his vehicle in order to collect compensation for the time he spent awaiting repair of the vehicle. Five days later Hufstetler filed a grievance, alleging that he had been discharged without just cause, in violation of the National Master Freight Agreement ("NMFA"). A NMFA arbitra-

tion panel considered the testimony presented by both Hufstetler and the plaintiff. The panel was composed of an equal number of representatives from a company and a union, none of which was a representative of the plaintiff. The panel rejected Hufstetler's claim that he had been dismissed in retaliation for his reporting of safety violations and determined that he had committed an act of dishonesty.

Subsequently Hufstetler contacted the Department of Labor and claimed that he had been dismissed for reporting safety violations, in violation of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305. The Secretary then conducted an investigation and determined that there was reasonable cause to believe that Hufstetler's complaint had merit. On January 21, 1985, the Secretary issued a preliminary order that required the plaintiff, *inter alia*, to pay backpay and to reinstate Hufstetler.

The plaintiff contends that the Secretary's preliminary order, issued pursuant to 49 U.S.C. § 2305(c)(2)(A), violates its right to procedural due process and causes the plaintiff to experience irreparable harm. Section 2305(c)(2)(A) provides that after the Secretary has issued a preliminary order either the employee or the employer within thirty days may file objections to the preliminary order and request a hearing, which is to be "expeditiously conducted." The statute specifically states that the request for a hearing does not stay that portion of the preliminary order that provides for reinstatement of an employee. After the conclusion of the requested hearing, the Secretary is to issue a final order within one hundred and twenty days.

To be entitled to preliminary injunctive relief, the movant must prove four elements: (1) there is a substantial likelihood that the movant will prevail on the merits; (2) the movant will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *See Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984). The requirement that the movant make a showing that there is a substantial likelihood of prevailing on the merits does not mean that the movant must actually succeed on the merits. *See Johnson v. United States Department of Agriculture*, 734 F.2d 774, 782 (11th Cir. 1984). The issue is "likelihood" of success. *Id.*

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "At a minimum, due process assures notice and a meaningful opportunity to be heard before a right or interest is forfeited." *Johnson*, 734 F.2d at 782. In *Mathews*, 424 U.S. at 335, the United States Supreme Court stated that three factors should be considered in determining the scope of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The balancing test outlined in *Mathews* requires a court to consider various factors. Although due process generally requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest, a deprivation is not unconstitutional if the "potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to

minimize the risk of erroneous determination." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19 (1978). Deprivation is also permissible if it is necessary to prevent imminent danger to the public. *See Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 300 (1981); *Burnley v. Thompson*, 524 F.2d 1233, 1241 (5th Cir. 1975).

Although no appellate court has examined the constitutionality of 49 U.S.C. § 2305(c)(2)(A), a federal district court has considered the constitutionality of regulations similar to the statute in the present case. *See Southern Ohio Coal Company v. Donovan*, No. C-2-78-1041, slip op. at 16-24 (S.D. Ohio Sept, 7, 1984) ("Southern Ohio"). In *Southern Ohio* an employer challenged the constitutionality of procedures employed by the Mine and Health Review Commission, 29 C.F.R. §§ 2700 *et. seq.* The employer contended that it was deprived of procedural due process when the Commission issued an *ex parte* order reinstating a discharged coal miner who had been dismissed for excessive absenteeism and who had alleged that he was discharged in violation of federal mine safety laws. The challenged regulations provided that when the Secretary issues an order of temporary reinstatement the employer may request a hearing and that a judge is to hold the requested hearing within five days. After considering the constitutionality of the regulations, the court declared that a hearing provided to an employer after five days of compelled reinstatement failed to meet the requirements of procedural due process, as articulated by the Supreme Court in *Mathews*. In an earlier decision involving the same parties, the court had granted injunctive relief to the employer who sought to enjoin enforcement of the order requiring reinstatement. *See Southern Ohio Coal Company v. Marshall*, 464 F. Supp. 450, 456 (S.D. Ohio 1978).

For relief to be proper in the present case, the plaintiff must satisfy the four elements of preliminary injunctive relief. The court will consider the elements seriatim.

1. Likelihood of Success on the Merits

The plaintiff's challenge to the constitutionality of 49 U.S.C. § 2305(c)(2)(A) requires this court to consider the three factors articulated by the Supreme Court in *Mathews*: the private interest affected by the government's action, the risk of erroneous deprivation, and the government's interest. 424 U.S. at 335. In determining the plaintiff's interest, the court recognizes that property interests "are not created by the Constitution, [but rather] they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Arnett v. Kennedy*, 416 U.S. 134, 151 (1974), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The plaintiff has an important interest in not being compelled to reinstate an employee that was dismissed for dishonest conduct; that was determined by an arbitration panel, as provided by the contract between the plaintiff and its employees, to be justly dismissed; that could cause the plaintiff to be subject to further acts of dishonesty; and that might cause an innocent employee to be replaced. The plaintiff has an interest in upholding the arbitration provision of its contract and in protecting its business by promptly discharging "deficient employees." *Burnley*, 524 F.2d at 1241. *See also Southern Ohio*, 464 F. Supp. at 456 (employer has a compelling interest in not reinstating person in supervisory position).

There is also a clear risk of erroneous deprivation of the plaintiff's interest in protecting its business. In the present case, the Secretary of Labor conducted an investigation,

which included an examination of the plaintiff's written statement of its view of the facts. The names of the people that the Secretary questioned were not made available to the plaintiff. In a case such as this one, where the employee claims that he was dismissed in retaliation for reporting safety violations and where the employee was determined to have acted dishonestly, an evidentiary hearing prior to compelled reinstatement would clearly lessen the risk of erroneous deprivation because the credibility and veracity of the witnesses would be determined. *See generally Mathews*, 424 U.S. at 344.

The government's interests in protecting employees from retaliation for the reporting of safety violation and in protecting the public by the promotion of safety would not be impaired by requiring that a hearing be conducted prior to reinstatement. Although this court recognizes that the findings of an arbitration board that are not appealed are not to be given res judicata or collateral estoppel effect [*see McDonald v. City of West Branch, Michigan*, 104 S. Ct. 1799, 1802 (1984)], the process afforded the plaintiff and the employee during arbitration is significantly more expansive than the process afforded by the Secretary during his investigation. In addition, the government does not incur any greater burden by being required to hold a hearing prior to deprivation because § 2305(c)(2)(A) already requires it to "expeditiously" conduct the requested hearing. Futhermore, there is no imminent danger to the public requiring the plaintiff to be deprived of its right to procedural due process. The decision of the arbitration panel, however, suggests that there is a clear risk of erroneous deprivation.

After considering the three factors for determining the scope of due process required by *Mathews*, the court finds

that the plaintiff has shown a substantial likelihood of success on the merits of its claim attacking the constitutionality of 49 U.S.C. § 2305(c)(2)(A).

2. Irreparable Harm

The plaintiff maintains that it will incur irreparable harm, harm that cannot be remedied by an award of monetary damages. The plaintiff contends that even if the Secretary determines after a hearing that Hufstetler was properly dismissed it will have been denied not only its right to procedural due process, but it will have also experienced interference with its collective bargaining agreement, disruption in its business caused by low morale and the layoff of an innocent employee, and apprehension of further acts of dishonesty. The harm that the plaintiff would be exposed to if an injunction were not granted would clearly be irreparable under the circumstances of this case.

3. Comparative Harm

The plaintiff argues that the harm caused by compelled reinstatement is greater than any harm that the defendants and Hufstetler would experience if a preliminary injunction were granted. Although the Secretary does have an interest in upholding the validity of statutes designed to promote safety, the court recognizes that the requirement of a hearing prior to ordered reinstatement would nonetheless protect the defendants' interest in promoting safety. The harm experienced by the plaintiff, however, is much greater because reinstatement would adversely affect its business, as discussed above, and only injunctive relief can adequately protect the plaintiff's interest, in contrast to Hufstetler's interest, which can be protected by an award of backpay and other benefits if the decision of the Secretary is favorable to him.

4. Public Interest

The plaintiff contends that the issuance of a preliminary injunction would not be adverse to the public interest because the granting of the injunction does not undermine the promotion of safety, but rather only requires the government to conduct its hearing prior to compelling reinstatement. The plaintiff maintains that the burden on the government to conduct the requested hearing prior to the ordering of reinstatement is minimal, but the burden on businesses forced to reinstate employees dismissed for dishonesty is great. By requiring a hearing prior to compelling reinstatement, the court would be protecting both the public's interest in safety and in promoting the plaintiff's business interests. In considering the facts of this case, the court finds that the issuance of a preliminary injunction would not be adverse to the public's interest.

In conclusion, the court finds that the plaintiff has proved the four elements necessary for the issuance of a preliminary injunction. Although the court is not insensitive to Hufstetler's economic status as a result of the awarding of injunctive relief, it nevertheless believes that the particular circumstances of this case make such an award equitable as well as legally necessary.

The defendants, and any of their officers, agents and anyone acting in active concert therewith, are hereby restrained and enjoined from enforcing that portion of the Secretary's preliminary order of January 25, 1985 which requires the plaintiff to temporarily reinstate Hufstetler. The plaintiff is hereby required as a condition of the above restraint to post a bond in the penal sum of $30,000.00 with good security, said bond to secure the payment of any and all damages that may accrue to any party as a result of the erroneous issuance of this order. The restraint imposed

herein shall not become effective unless and until said bond is posted and approved as to form and security by the clerk of this court.

SO ORDERED, this 11 day of February, 1985.

/s/ G. Ernest Tidwell

G. ERNEST TIDWELL
Judge,
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR

IN THE MATTER OF:

ROADWAY EXPRESS, INC./JERRY W. HUFSTETLER

Section 405 Complaint, Case No.: 4-0280-84-503

SECRETARY'S FINDINGS AND PRELIMINARY ORDER

Pursuant to Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter, "STAA") (49 U.S.C. 2305), Complainant Jerry W. Hufstetler filed a complaint with the Secretary of Labor alleging that Respondent, Roadway Express, Inc., discriminatorily fired Complainant as reprisal for complaining about DOT safety violations, (breakdowns). Respondent denied the allegation. Following an investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator, Region IV, of the Occupational Safety and Health Administration, pursuant to Section 405 of STAA, Secretary's Order 9-83, 48 F.R. 35736 (August 5, 1983), and CPL 2.45, Chapter X (March 8, 1984) finds that there is reasonable cause to believe the following:

1. (a) Respondent, Roadway Express, Inc., is engaged in interstate trucking as a part and portion of their business, Respondent's employees operate commercial motor vehicles in interstate commerce principally to transport cargo. Consequently, Respondent is subject to the STAA.

(b) Respondent, at all times material herein, has been a person as defined in Section 401(4) of STAA (49 U.S.C. 2301(4)).

2. (a) In April, 1977, Respondent hired Complainant Hufstetler to his position as a driver of a commercial motor vehicle, to wit, a tractor-trailer with a gross vehicle weight rating in excess of 10,000 pounds.

(b) At all times material herein, Complainant Hufstetler was an employee within the meaning of the STAA, in fact he was a driver of a commercial motor vehicle used on the highways in interstate commerce to transport goods and products and in that he was employed by a commercial motor carrier, and in the course of this employment, directly affected commercial motor vehicle safety (Section 401(2)(A) of STAA, 49 U.S.C. 2301(2)(A).

3. (a) On or about February 7, 1984, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him in violation of Section 405 of STAA (49 U.S.C. 2305(C)(2)(A). This complaint was timely filed.

(b) The Secretary, acting through his duly authorized agents, thereafter investigated the above complaint in accordance with Section 405 of STAA (49 U.S.C. 2305(C)(2)(A)), and has determined that there is reasonable cause to believe that the Respondent has violated Section 405(a) of STAA.

4. On or about November 22, 1983, Respondent notified Jerry W. Hufstetler that he was discharged from employment as of November 22, 1983, principally because he allegedly had created a false breakdown, an act of dishonesty, on November 22, 1983. Respondent's evidence to support the discharge is conjecture. Complainant has presented evidence to support his innocence. Respondent had threatened to do anything they could to catch the Complainant doing something wrong, to get rid of him.

5. Complainant had a two year history of bringing vehicle safety problems to the attention of the Respondent and had complained to DOT and to elected public officials. These complaints constitute protected activity under the Act.

6. Respondent had warned Complainant and threatened to get him due to his excessive breakdowns due to Complainant's recognition of safety violations.

7. Respondent's termination of Complainant's employment was discriminatorily motivated by Complainant's protected activity. Thus, Respondent's discharge was a violation of Section 405(a) of STAA (49 U.S.C. 2305(a)).

8. Complainant's backpay is to be calculated from the date of his discharge, November 22, 1983, up to and including the date he either finds new employment or refuses reinstatement with Roadway Express, Inc., whichever comes first. Backpay is to be calculated and paid at $997.00 per week, which was Mr. Hufstetler's average weekly pay prior to his termination, plus 10% interest per annum on the entire amount owed.

JANUARY 21, 1985
Date

/s/ ALAN C. MCMILLAN
Alan C. McMillan
Regional Administrator

ORDER

Pursuant to Section 405(c)(2)(A) of the Act, the Secretary of Labor, acting through his agent, in accordance with the findings made herein, orders Respondent, Roadway Express, Inc., to immediately offer reinstatement to Jerry W. Hufstetler to his former position of employment with accumulated seniority; to compensate him for backpay in an amount based on the terms of paragraph 8 of the Findings and to expunge from his personnel records any adverse references to his discharge or any protected activity.

/s/ ALAN C. MCMILLAN
Alan C. McMillan
Regional Administrator

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA – ATLANTA DIV.

C85-997A

ROADWAY EXPRESS, INC.

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR &
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR

Decision by Court. This action came on for consideration before the Court with Honorable G. Ernest Tidwell, judge presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for summary judgment is granted. Accordingly, defendants are hereby restrained and enjoined from further issuance of preliminary orders of reinstatement pursuant to 49 USC 2305(c)(2)(A) without first conducting evidentiary hearing. Judgment entered for plaintiff, ROADWAY EXPRESS, INC. against defendants, RAYMOND J. DONOVAN, Secretary of Labor and ALAN C. MCMILLAN, Regional Administrator Region Four U.S. Dept. of Labor, for costs.* * *

Filed and entered in clerk's office November 18, 1985
Luther D. Thomas, Clerk

/s/ DIANE TAYLOR
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC.,
A DELAWARE CORPORATION, PLAINTIFF-APPELLEE,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
REGION FOUR, U.S DEPARTMENT OF LABOR,
DEFENDANTS-APPELLANTS

NOTICE OF DIRECT APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 2101(a) (1985) and Sup.Ct.R. 10, William E. Brock, Secretary of Labor and Alan C. McMillan, Regional Administrator, Region Four, U.S. Department of Labor, through their attorney, the United States Attorney for the Northern District of Georgia, file this Notice of Appeal of the order and judgment of the District Court in the above-styled case, entered on November 18, 1985. Appeal is taken directly to the United States Supreme Court pursuant to 21 U.S.C. § 2101 (1985). Service is being made at the time of this filing on Michael C. Towers and John B. Gamble, Jr., Fisher and Phillips, 3500 First Atlanta Tower, Atlanta, Georgia 30383.

An affidavit of proof of service is attached.

Respectfully submitted,

LARRY D. THOMPSON
United States Attorney

J. WILLIAM BOONE
Assistant U.S. Attorney
1800 U.S. Courthouse
75 Spring St., S.W.
Atlanta, Georgia 30335
Georgia Bar No. 067856

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC.,
A DELAWARE CORPORATION, PLAINTIFF-APPELLEE,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
REGION FOUR, U.S DEPARTMENT OF LABOR,
DEFENDANTS-APPELLANTS

AFFIDAVIT OF PROOF OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

Before the undersigned officer duly authorized to administer oaths, personally appeared J. William Boone, who being duly sworn deposes and states as follows:

1

I, J. William Boone, am an Assistant United States Attorney for the Northern District of Georgia and am one of the attorneys in the case of Roadway Express, Inc., a Delaware Corporation v. William E. Brock, Secretary of Labor and Alan C. McMillan, Regional Administrator, Region Four, U.S. Department of Labor.

2.

Pursuant to Sup.Ct.R. 28.2 and 28.5(c), I certify that on the 17th day of December, 1985, one copy of the Defendants-Appellants' Notice of Direct Appeal to the U.S. Supreme Court of the district court's order, opinion, and judgment of November 18, 1985, in the above case was mailed by depositing it in U.S. Postal facilities, first-class postage prepaid, to Michael C. Towers and John B. Gamble, Jr., Fisher and Phillips, 3500 First Atlanta Tower, Atlanta, Georgia 30383.

3.

All parties required by Sup.Ct.R. 28.4(a) to be served have been served.

Further affiant saith not.

LARRY D. THOMPSON
United States Attorney

J. WILLIAM BOONE
Assistant U.S. Attorney
1800 U.S. Courthouse
75 Spring St., S.W.
Atlanta, Georgia 30335
Georgia Bar No. 067856

APPENDIX F

U.S. Department of Labor
Office of Administrative Law Judges
Suite 901 1001 Howard Avenue
New Orleans, LA 70113

85-STA-8

IN THE MATTER OF
JERRY W. HUFSTETLER, COMPLAINANT
ROADWAY EXPRESS, INC. RESPONDENT
JERRY W. HUFSTETLER
Pro se
DAVID E. JONES, ESQ.
FOR THE U.S. DEPT. OF LABOR
MICHAEL C. TOWERS, ESQ.
MICHAEL D. CULLINS, ESQ.
FOR THE RESPONDENT
BEFORE: JAMES W. KERR, JR.
ADMINISTRATIVE LAW JUDGE

RECOMMENDED DECISION AND ORDER

This is a proceeding by Complainant, Jerry W. Hufstetler, for reinstatement, back pay and all other terms, conditions and privileges of his former employment by Roadway Express, Inc., pursuant to the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2301, *et seq.*, hereinafter referred to as "the Act". A hearing was conducted in Sarasota, Florida, March 26 through 29, 1985, at which time all parties were afforded the opportunity to offer documentary evidence and testimony, examine and cross-examine witnesses, make oral arguments

and to submit written briefs and proposed findings of fact and conclusions of law in support of their respective positions. Based upon all evidence admitted at the hearing and the post-hearing submissions, the following findings and conclusions are made.[1]

In order to permit post-hearing development of evidence regarding mitigation of damages, the record in this case closed September 1, 1985.

FINDINGS OF FACT

1. Respondent, Roadway Express, Inc., operates commercial motor vehicles with a gross weight rating of 10,000 pounds or more which are assigned to drivers to transport cargo in interstate commerce.

2. Complainant was employed by Respondent in April 1976 at the Atlanta, Georgia terminal as a road driver or line haul driver. He was transferred approximately one year later to the Roadway terminal in Lake Park, Georgia.

3. On or about August 1979, Archie Jenkins assumed the position of relay manager at Respondent's Lake Park, Georgia, terminal. Several coordinators, dispatchers and approximately 60 road drivers, including Complainant, were under the supervision of Mr. Jenkins.

4. Prior to October 1982, Complainant's "breakdown" record was not unusual compared to other road drivers assigned to the Lake Park, Georgia, terminal. A "breakdown" occurs when the need for mechanical repairs prevents a tractor trailer from being operated in compliance with the U.S. Department of Transportation, Federal Highway Administration, Federal Motor Carrier Safety Regulations, regardless of whether the condition renders a truck inoperable. Drivers for Respondent

[1] References herein to the transcript are designated "Tr." References to Department of Labor exhibits are "P." and Respondent's exhibits are "D.".

prepare daily logs, the originals of which are given to the company with the drivers maintaining carbon copies. In addition to the information required by the logs, Complainant also entered notations describing his breakdowns.

5. Respondent compensates its road drivers at the rate of $13.15 per hour for breakdowns. The road drivers earn between $15.00 and $16.00 per hour while actually driving their trucks. The Department of Transportation Safety Regulations require that a road driver may not be on duty for more than 70 hours in any eight day period. Breakdown time is counted toward the maximum on duty time unless the driver is relieved of duty during that period. A driver is paid $13.15 per hour even though he has been relieved of duty during a breakdown. A breakdown may cause a driver to lose the opportunity of taking a longer, more profitable trip.

6. On October 30, 1982, a coordinator dispatched Complainant, over his objection, from the Lake Park terminal with a trailer having a broken main spring. Subsequently, the Florida Highway Patrol issued a mandatory repair order for this safety defect and Complainant incurred approximately 25 hours of breakdown time. Complainant wrote a letter to the Director of the Federal Highway Administration complaining about being dispatched with a broken main spring. Also, he filed a union grievance due to Respondent's failure to pay him during the breakdown time.

7. While returning to the Lake Park terminal after the broken spring had been repaired, a problem developed with the brake lights on the truck. The Lake Park relay dispatcher ordered Complainant to "bring his unit home" and Complainant proceeded to his personal residence. When Mr. Jenkins learned that the Complainant had taken the truck to his house rather than to the Lake Park terminal, he issued Complainant a warning letter.

Mr. Jenkins was later discharged for unacceptable job performance, though there is no evidence that this incident was involved in the decision to remove him.

8. On November 27, 1982, Complainant discovered a flat tire on his tractor in De Land, Florida. A temporary repair was made but the tire again went flat during the trip to Lake Park. Claimant telephoned the relay dispatcher and informed him of the problem. The dispatcher instructed Complainant to proceed to Lake Park with the flat tire, notwithstanding a company policy prohibiting driving under such circumstances. Complainant filed a complaint with the FHA concerning this incident.

9. On December 2, 1982, Complainant wrote a letter to Respondent's Chairman of the Board, Mr. Charles Zodrow, complaining about the lack of concern for safety by Mr. Jenkins and the dispatcher in connection with the broken main spring and the flat tire. Mr. Jenkins knew of Complainant's communication to a company official.

10. On January 16, 1983, Complainant discovered that his brake lights were not working. As the truck could not be repaired by mechanics sent by the dispatcher, the truck was towed to the relay terminal.

11. On January 19, 1983, after Complainant's truck had been inspected prior to dispatch by a Roadway employee, Complainant discovered a broken main spring. The spring was changed after Complainant brought the matter to the attention of the dispatcher.

12. Mr. Jenkins had knowledge of Complainant's breakdowns. At a union/management meeting January 20, 1983, Mr. Jenkins stated that if Complainant was not careful, the breakdowns could get him into trouble. This comment was interpreted by at least one official as meaning that Complainant's breakdowns might result in his discharge.

13. On January 25, 1983, Mr. Jenkins issued Complainant a warning letter concerning the positioning of the CB radio on the dash of his cab. This resulted in Com-

plainant filing a union grievance contending that the position of the CB radio did not obstruct the driver's vision in violation of DOT safety regulations.

14. On May 23, 1983, Mr. Jenkins issued a warning letter to Complainant, accusing him of exceeding the speed limit to Roadway's St. Petersburg, Florida, terminal. The time clock at that terminal has a history of being innaccurate, which is known by Respondent. Three other Roadway drivers were given citations for speeding by the Florida Highway Patrol, but were not issued letters of reprimand. Complainant filed a union grievance concerning the letter issued to him.

15. On June 12, 1983, Complainant filed a union grievance concerning whether a driver could be required to pull a trailer having defective marker lights. He supplemented this grievance August 24, 1983, by attaching a response from the FHA, citing the applicable DOT safety regulations that all marker lights are required to work and that violations are punishable against the driver, the motor carrier, or both. The record supports the conclusion that Mr. Jenkins knew about this grievance.

16. On June 10, 1983, June 18, 1983, July 8, 1983 and July 20, 1983, Complainant continued to have problems with trailers having malfunctioning lights. On each date he reported the specific problem and was advised either to continue with the trip or that there was no requirement that the lights work.

17. On June 18, 1983, Complainant wrote a letter to the headquarters office of Roadway Express, informing the company of Mr. Jenkins' lack of concern for safety and compliance with the DOT safety regulations.

18. On July 2, 1983, Complainant, who was in Gainesville, Florida, had reached the maximum allowable driving time permitted by the DOT safety regulations. Complainant stopped at a motel with which Roadway had no credit; however, there was no violation of a company

policy or the collective bargaining agreement. When Complainant informed the Lake Park dispatcher that he had reached the maximum allowable driving time, he was directed by Mr. Jenkins to drive to another motel, causing him to exceed the maximum driving time by 2.25 hours. Complainant filed a union grievance, requesting payment for the driving and delay time incurred. He also filed a complaint with the FHA for exceeding the maximum driving time.

19. On August 6, 1983, Respondent issued a warning letter to Complainant for exceeding the company imposed running time on a trip from Miami, Florida, to Valdosta, Georgia. Complainant followed the route prescribed by Respondent but was delayed due to construction. Two other drivers reduced their time by driving off route across Alligator Alley, a toll road. A driver is subject to being issued a warning letter for driving off route, but Respondent reimbursed those drivers for their tolls and failed to issue warning letters. Complainant protested this incident by filing another union grievance.

20. In August, 1983, Complainant experienced a broken clutch while enroute to the St. Petersburg, Florida terminal. Approximately a month later, on September 4, 1983, Complainant was provided with a city truck to drive to lunch while repairs were being made to the warning and marker lights on his trailer. A water hose broke while Complainant was driving the city truck. When he called to report the situation, Michael Titus, the terminal manager, stated over the phone "I'm sick of your (expletive); I'm going to personally see to it you get yours." (Tr. p. 703). When Complainant returned to the terminal, Mr. Titus stated, *inter alia*, "I'm going to personally see to it you get yours." (Tr. pp. 704-705).

21. Mechanic, Lee Pearson, advised Mr. Titus that the problem with the city truck was the result of a worn part. However, Mr. Titus continued to blame Complainant for the breakdown.

22. The day after the breakdown of the city truck, Mr. Titus was quoted as stating that somewhere or somehow he was going to discharge Complainant.

23. As a result of Mr. Titus's threat, Complainant wrote to the president of Roadway and the president of the union.

24. From February 1981 through November 1983, excluding the months of April 1981, September 1982 and May 1983, Complainant's daily logs reflect that he had 163 breakdowns. During ten months in 1983, Complainant had 35 breakdowns due to problems with various lights on his trucks.

25. Prior to a breakdown on November 22, 1983, there is nothing in the record to suggest that any of the problems with Complainant's tractors or trailers were not legitimate. Among his associates at Roadway, Complainant had the reputation of being honest.

26. The Road Boss II tractors commonly driven by Respondent's drivers were generally in well worn condition with breakdowns a common occurrence. The condition of those trucks provided Complainant with ample opportunity to detect violations of the DOT safety regulations.

27. Before a Roadway road driver departs on a trip, a mechanic or other terminal employee performs a pre-trip inspection to insure that the truck is in compliance with the DOT safety regulations. However, road drivers have found flat tires and other obvious problems on trucks that had been approved for dispatch.

28. On November 19, 1983, Complainant wrote to the FHA requesting information as to whether a driver, who had discovered a safety defect, could be required to drive a truck which a mechanic had certified to be in safe operating condition. Complainant gave a copy of the FHA's response, that if a driver operates a truck under

such circumstances it would violate DOT safety regulations, to Roadway's shop foreman in Lake Park and he posted another copy on the bulletin board in the relay terminal.

29. On November 21, 1983, Complainant was dispatched from Lake Park to the St. Petersburg terminal. At approximately 11:00 P.M., near Tampa, Florida, Complainant was advised through a CB conversation with another driver that the marker lights on his truck were not operating.

30. Complainant arrived at the St. Petersburg terminal shortly after midnight November 22, 1983. After the trailer which was to be returned to Lake Park was hooked to Complainant's tractor, terminal employee Bill Radovich performed a pre-trip inspection. He testified that he did not remember whether the tractor marker lights were on or off, but he did check to insure that they were working.

31. Complainant, after being advised that the truck was ready to go, conducted his own pre-trip inspection and discovered that the tractor marker lights and a marker light on the trailer were out. When Mr. Titus was advised of the situation, he became visably angry.

32. Complainant was driving a Road Boss II tractor on this occasion. The marker light connector plug on this type of tractor is located underneath the dash board near the front part of the passenger door. It is extremely difficult, if not impossible, to reach the widow crank on the passenger side from the driver's seat. It is, therefore unlikely that it would be possible to unplug the marker light connector from the driver's seat.

33. Vendor mechanic Pearson went to the St. Petersburg terminal to repair Complainant's truck. He corrected the problem by pluging the marker light connector. He noticed that the wires to the connector had dirt on them but that the connector itself was clean. Mr. Pearson

also repaired the marker light on the top right front of the trailer by pushing the light back into its holder. He concluded it had a loose connection which could have been caused by any kind of vibration.

34. After Mr. Titus was informed of the unpluged connector, he contacted Mr. Jerry Morgan. Mr. Morgan then called Mr. Jenkins and informed him of the earlier conversation with Mr. Titus.

35. Under the terms of the collective bargaining agreement, an employee of Roadway may be discharged without a warning notice for committing an act of dishonesty. On the basis of the information provided by Mr. Titus, Mr. Jenkins decided November 22, 1983 to discharge Complainant and directed Mr. C. Boatwright to issue the discharge notice.

36. Mr. Jenkins was aware that Complainant had filed complaints concerning safety violations involving Roadway with Senator Hawkins and Congressman Hatcher.

37. Complainant filed a complaint concerning the discharge with the U.S. Department of Labor on February 7, 1984.

38. During the years 1982 and 1983, Complainant earned $48,829.67 and $51,892.48, respectively, working for Respondent.

39. At all times relevant herein, Respondent contributed $45.50 per employee, per week, to the Central States, Southeast and Southwest Areas Health and Welfare Fund and $55.00 per employee, per week, to the Central States Southeast and Southwest Areas Pension Fund, respectively.

40. In 1984, after being discharged by Respondent, the Georgia Department of Labor awarded Complainant $4,250.00 in unemployment compensation.

41. Complainant started looking for a new job immediately after his discharge by Roadway. He contacted every trucking company in Valdosta, Georgia, and also

contacted prospective employers in Jacksonville, Florida, Savannah, Titusville and Whitman, Georgia.

42. Complainant worked for Boyd Brothers Transportation Company of Clayton, Alabama, September 11 through September 18, 1984. He earned $505.40 during this eight day period.

43. Complainant then worked as a truck driver for Glen McClendon Trucking Company from October 17, 1984 through December 14, 1984. He earned $3,024.59.

44. Complainant left the employment of Boyd Brothers and McClendon Trucking due to alleged safety violations and his need to attend to personal farming business.

45. In January 1985, Complainant earned $300.00 from Don's Trucking Company. He resigned that position after receiving notice that the Regional Administrator had ordered his reinstatement by Roadway. By the time Complainant had learned that Roadway intended to appeal the reinstatement order, Don's Trucking Company had hired a replacement driver.

46. On April 15, 1985, Complainant was hired as a driver by Taylor-Maid Transportation, Inc. of Albany, Georgia. This employment is continuing and, through July 29, 1985, Complainant has received gross wages in the amount of $5,581.64.

47. At the hearing Complainant waived his statutory right to recover for expenses he may have incurred in regard to this complaint and in seeking other employment.

CONCLUSIONS OF LAW

1. Complainant, at all relevant times, was employed as a driver of commercial motor vehicles and, therefore, was an employee within the meaning of Title 49, U.S.C. § 2301(2).

2. Respondent, Roadway Express, Inc., operates motor vehicles which are assigned to its employees to transport in commerce, and is an employer and a person, respectively, within the meaning of Title 49, U.S.C. § 2301(3) and (4).

3. Complainant timely filed a complaint with the Regional Administrator alleging a violation of Section 2305(a).

4. Section 2305(a) provides that "(n)o person shall discharge, discipline or in any manner discriminate against employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee . . . has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard or order, or has testified or is about to testify in any such proceeding."

5. Complainant took action ". . . relating to a violation of a commercial motor vehicle safety rule, regulation, standard or other order" within the meaning of Section 2305(a), in that the following safety related concerns expressed by Complainant are reflected in the DOT safety regulations:

> a) main springs on trailers—The obvious requirement that such be operational and not broken, to prevent a trailer from overturning or losing control, is set forth at Sec. 396.7(a) which provides that trucks shall not be operated in such a condition as to likely cause an accident.
>
> b) Brake (stop) lights on trailers—Sec. 393.14(b) requires the rear of trailers to have two stop lights, which are actuated upon application of the brakes [Sec. 393.25(g)] and are in working order [Sec. 393.91].

c) flat tires—Sec. 393.75(f)(4) provides that trucks may not be operated with less tire pressure than that specified for the load being carried.

d) marker lights—Sec. 393.14(a) and (c) require trailers to have marker lights. Tractors are required to have marker lights ["identification" and "clearance" lamps] pursuant to Sec. 393.13. All marker lights are required to work pursuant to Sec. 393.9 and must be steady burning as required by Sec. 393.26(f).

e) trailer tail lights—Such are required pursuant to Sec. 393.14(b), must be in working order as required by Sec. 393.9 and are required to be steady burning pursuant to Sec. 393.26(f).

f) maximum on duty time—For Roadway drivers, such may not exceed 70 hours in an eight day period pursuant to Sec. 395.3(b).

g) rules against speeding—Sec. 392.2 requires that trucks be operated in compliance with the laws of the jurisdiction wherein operated. Sec. 392.6 prohibits a motor carrier from scheduling runs requiring speeding for the timely completion thereof.

h) clutch—Such must be operational pursuant to Sec. 396.7(a), which requires that trucks shall not be operated in such a condition as to likely cause an accident.

i) loose wires—These are prohibited by Sec. 393.33, which requires that wires be systematically arranged and installed in a workmanlike manner.

j) headlights—Section 393.13(a) and 393.9, respectively, require tractors to be equipped with two headlights which are in working order.

k) accelerator spring—Such must be operational pursuant to Sec. 396.7(a), which requires that trucks shall not be operated in such a condition as to likely cause an accident.

l) decalomania or stickers—Pursuant to Sec. 393.60(c), such may extend upward no more than 4.5 inches from the bottom of a truck's windshield.

6. The reporting of breakdowns to Roadway supervisors, the letters of complaint directed to Roadway officials and the filing of complaints and opinion requests with the FHA are protected activities for which an employee cannot be discharged or discriminated against by his employer. These activities constitute the filing of a complaint within the meaning of Section 2305(a).

7. The totality of the evidence causes the conclusion that the protected activity engaged in by Complainant, of which Respondent had knowledge, was the motivating factor resulting in the discharge. The record is replete with many statements by Roadway supervisors demonstrating their animus toward the Complainant as a result in his engaging in protected activities. The issuance of warning letters to Complainant, while other employees were not reprimanded for similar acts, and the acrimonious statements cause the conclusion that the discharge had a retaliatory motive.

8. Respondent has failed to prove by a preponderence of the evidence that Complainant was discharged for legitimate reasons apart from any improper motivation. The alleged commission of "an act of dishonesty . . . creating a false breakdown" is a possible, but not probable interpretation of the conflicting evidence concerning the incident of November 22, 1983.

9. While it could be argued that Complainant would benefit from a lengthy breakdown, there is nothing to indicate that he benefitted from a brief breakdown at the relay terminal. Based on the entire record and particularly the appearance and demeanor of Complainant during the trial, a conclusion that Complainant created a false breakdown is not warranted. The primary evidence for such a conclusion would have to come from the testimony of Mr. Titus. Due to the personal animus he demonstrated

towards the Complainant, this testimony must be closely scrutinized and is, therefore, insufficient to establish the existence of a false breakdown or even a good faith belief that it might have occurred.

10. While the actual order to discharge Complainant was authorized by Mr. Jenkins, he acted on the basis of information received from Mr. Titus. The conclusion that Mr. Titus intended to unlawfully discriminate against Complainant vitiates the discharge order. Further, the record supports the conclusion that Mr. Jenkins was annoyed by Complainant's engaging in protected activity.

11. The motive of Respondent at the time of the discharge controls whether a discriminatory purpose was involved. Any information obtained during Roadway's post-discharge investigation conducted December 13 and 14, 1983 does not mitigate the unlawful motive demonstrated November 22, 1983.

ORDER

It is, therefore, ORDERED, ADJUDGED AND DECREED that Respondent, Roadway Express, Inc., shall:

1. Reinstate Complainant to his former position with back pay and restore the seniority and other benefits, including but not limited to health and welfare and pension contributions to which he would have been entitled had he not been discharged.

2. The amount of back pay due Complainant is determined by subtracting actual earnings in mitigation from the wages he could have earned with Roadway but for the discharge.

3. Complainant's back pay is to be calculated at the rate of $1,115.97 per week.

It is further ORDERED:

1. Respondent is not liable for pre-judgment interest, and

2. The back pay award is to be reduced by the $4,250.00 in unemployment compensation paid by the State of Georgia.[2]

Entered this 30th day of October, 1985, at New Orleans, Louisiana.

/s/ JAMES W. KERR, JR.
Administrative Law Judge

[2] Respondent has not demonstrated that Complainant failed to make reasonable efforts to obtain interim employment. Respondent introduced no evidence that there were jobs available which Complainant could have discovered and for which he was qualified. However, the evidence causes the conclusion that Complainant's personal farming business was a critical factor in his relationship with Boyd Brothers and McClendon Trucking. His resignation from Don's Trucking Company prior to being reinstated by Roadway did not constitute good judgment. Since it would be speculative as to whether Complainant would have worked out his differences with Boyd Brothers or McClendon Trucking absent the requirements of his personal farming business, the Court is of the opinion that denying interest on the amount due and permitting credit for the unemployment compensation is the appropriate remedy.

APPENDIX G

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

File No. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION,
PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION FOUR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

AFFIDAVIT OF LEON P. SMITH

COUNTY OF FULTON
STATE OF GEORGIA

1. My name is Leon P. Smith. I am employed by the United States Department of Labor, Occupational Safety and Health Administration, as the Regional Supervisory Investigator of the 11(c) Section in Atlanta, Georgia.

2. In my capacity as Supervisory Investigator, I have knowledge of the Department of Labor's procedures for the conducting of investigations under § 405 of the Surface Transportation Assistance Act of 1982 [49 U.S.C. § 2305] [hereinafter the "Act"]. I also have knowledge of the Department's investigation conducted under the Act into the complaint of Jerry W. Hufstetler, which complaint was filed on February 7, 1984. The field investigator who investigated Mr. Hufstetler's complaint was Don Cameron of my staff.

3. In the investigation of cases under the Act, the Secretary of Labor, through the Occupational Safety and Health Administration, utilizes experienced investigators who conduct a substantial investigation to determine whether a complaint has merit. Under existing investigatory procedures, the persons alleged to be primarily responsible for the discriminatory action are afforded the opportunity to fully state and support their positions. Additionally, the assigned field investigator is required to verify the complainant's allegations through credible, independent evidence. The investigator's report is then reviewed by the regional supervisory investigator, and, where a complaint is found to have merit, by the Occupational Safety and Health Administration's Regional Administrator and by attorneys within the Office of the Solicitor.

4. The investigatory and review procedures outlined in paragraph 3, hereinabove, were utilized in full in the investigation of Hutstetler's complaint under the Act, and led to a finding on behalf of the Secretary of Labor of reasonable cause to believe that Hufstetler's complaint had merit.

I have freely given this Affidavit, and, to the best of my knowledge and belief, it is true, accurate and correct.

/s/ Leon P. Smith
LEON P. SMITH

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION, PLAINTIFF,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION FOUR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to the provisions of L.R. 220-5(b)(1), N.D. Ga. and in support of its motion for summary judgment filed herewith, defendant Roadway Express Inc. ("Roadway") submits its statement of material facts as to which there is no genuine issue to be tried:

1.

Roadway is a common motor carrier engaged in interstate trucking as a part of its business in Lake Park, Georgia; as a part of its business, Roadway employees operate commercial motor vehicles in interstate commerce principally to transport cargo; Roadway therefore is subject to the provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA"), and to defendants' efforts to enforce the provisions thereof. (Complaint, ¶ 15, Ex, C; Answer, ¶ 15).

2.

On November 22, 1983, former Roadway employee Jerry W. Hufstetler was discharged bv Roadway Express inc. for an alleged act of dishonesty. (Complaint, ¶s 5,7; Defendant's Answer, ¶s 5,7).

3.

On November 27, 1983, Hufstetler filed a grievance under the provisions of the National Master Freight Agreement, a collective bargaining agreement governing the working conditions of Roadway employees at the company's Lake Park Georgia facilities who are represented by Teamsters Local Union No. 528 ("Local 528"). (Complaint, ¶ 7; Answer, ¶ 7).

4.

Discharge cases filed as grievances under the NMFA ordinarily are resolved at a first level arbitration panel hearing or within three months thereafter if a deadlock occurs at the first level (Multistate) and the case proceeds to a second level arbitration panel (Area). (Second Webb Aff., ¶¶ 4-5).

5.

Under the NMFA, Multistate and Area arbitration panels have the right to reinstate discharged employees with full, partial or no compensation for time lost; when such panels find in favor of a discharged employees, the employee is ordered reinstated. (Second Webb Aff., ¶ 5).

6.

When Roadway drivers are reinstated by order of a NMFA committee or otherwise, and an extra driver is not needed at the driver's home terminal, a driver at that ter-

minal is laid off in accordance with the terms of the NMFA. (Second Webb., ¶ 6).

7.

On December 19, 1983, Hufstetler's grievance was heard before the Southern Multi-State Grievance Committee ("Multi-State Committee"), an arbitration panel established pursuant to the terms of the NMFA. (Complaint, ¶ 9; Answer, ¶ 9).

8.

The Multi-State Committee deadlocked and the case was referred to the Southern Conference Area Grievance Committee ("Area Committee"), a second level arbitration panel established pursuant to the terms of the NMFA. (Complaint, ¶ 9; Answer ¶ 9).

9.

On January 30, 1984, the Area Committee denied Hufstetler's grievance and sustained his discharge for an act of dishonesty in creating a false breakdown at Roadway's St. Petersburg, Florida terminal. (Complaint, ¶ 9; Answer, ¶ 9).

10.

On February 7, 1984, Hufstetler filed a telephonic complaint with the Atlanta office of the United States Department of Labor ("DOL") in which he complained that he had been discharged because "the St. Petersburg's terminal manager was upset [when he] requested costly repairs needed for truck driving safety." (Complaint, ¶ 10; Answer, ¶ 10).

11.

Upon the receipt of this complaint by telephone, the DOL began an investigation to determine whether Hufstetler had been terminated from employment by Roadway in violation of Section 405 of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 2305. (Complaint, ¶ 10; Answer, ¶ 10).

12.

DOL investigated Hufstetler's complaint through an investigating officer; pursuant to DOL's request during the investigation, Roadway submitted a written position statement with supporting affidavits explaining the circumstances of Hufstetler's discharge and the NMFA arbitration decision upholding the discharge. (Complaint, ¶ 11; Answer, ¶ 11).

13.

On September 7, 1984 Roadway's counsel wrote a letter to DOL stating Roadway's position that any preliminary order reinstating Hufstetler prior to the conduct of an evidentiary hearing would constitute a denial of due process of law under the Fifth Amendment to the United States Constitution. Complaint, ¶ 12; Answer, ¶ 12).

14.

During DOL's investigation of Hufstetler's complaint, DOL denied Roadway access to written statements of witnesses provided to DOL during its investigation of Hufstetler's complaint on the grounds that such statements were "confidential," and denied Roadway knowledge of names of the individuals from whom statements were taken by the DOL investigator. (Complaint, ¶ 14; Answer, ¶ 14).

15.

Defendants' procedures for determining whether to issue temporary reinstatement orders pursuant to 49 U.S.C. § 2305(c)(2)(A) include a field investigation by an assigned DOL employee, a review of the investigator's report by a regional supervisory investigator, and, where the investigator finds the complaint to have merit, by the Occupational Safety and Health Administration's Regional Administrator and by attorneys with DOL's office of the Solicitor; such procedures do not include an evidentiary hearing on the merits of the complaint prior to issuance of such a temporary reinstatement orders. (Affidavit of Leon P. Smith, ¶ 3).

16.

To date, DOL has established no regulations or other procedures whereby on evidentiary hearing is to be conducted prior to DOL's issuance of pre-hearing preliminary orders of reinstatement pursuant to 49 U.S.C. § 2305 (c)(2)(A). (Smith Aff., ¶ 3).

17.

On or about January 21, 1985, DOL rendered its Secretary's findings and preliminary order ordering Roadway to "immediately" reinstate Hufstetler to his former position as a road driver prior to any hearing on Hufstetler's STAA complaint; the January 21, 1985 order also required payment of back pay calculated from the date of Hufstetler's discharge. (Complaint, ¶ 15,19; Answer, ¶s 15, 19; Smith Aff., ¶ 4).

18.

On or about January 31, 1985, Roadway timely filed its objections to the January 21, 1985 Secretary's findings and preliminary order pursuant to 49 U.S.C. § 2305(c)(2)(A). (Complaint, ¶ 16; Answer, ¶ 16).

19.

A substantial controversy exists between Roadway and defendants with respect to whether 49 U.S.C. § 2305(c)(2)(A), insofar as it purports to empower and require defendants to issue preliminary order of reinstatement prior to the conduct of an evidentiary hearings, is unconstitutional and void as violative of the minimum requirements of procedural due process under the Fifth Amendment: Roadway contends that the due process clause of the Fifth Amendment requires that an evidentiary hearing be conducted prior to the issuance of any order of reinstatement; defendants contend that the Secretary of Labor is constitutionally empowered and required under 49 U.S.C. § 2305(c)(2)(A) to issue and enforce such preliminary orders of reinstatement without such a hearing. (Complaint, ¶ 22; Answer, ¶ 22).

Respectfully submitted,
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By: /s/ John B. Gamble, Jr.
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Attorneys for Roadway Express, Inc.

No. 85-1530

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM E. BROCK, SECRETARY,

AND

ALAN C. McMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION,

Appellants,

vs.

ROADWAY EXPRESS, INC.,

Appellee.

MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes and Regulation

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on November 18, 1985, by the Honorable G. Ernest Tidwell, Judge, United States District Court of the Northern District of Georgia. He declared that the Order of the Secretary of Labor dated January 21, 1985 is violative of the requirements of procedural due process to the extent that it requires the appellee to temporarily reinstate a discharged employee prior to an evidentiary hearing. He further held that 49 U.S.C. §2305 (c) (2) (A) is unconstitutional and void to the extent that it empowers appellants to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process. Accordingly, the District Court permanently restrained and enjoined the appellants and any of their officers, agents and anyone acting in concert therewith from further issuance of preliminary orders of reinstatement pursuant to 49 U.S.C. §2305(c)(2)(A) without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process under the Fifth Amendment to the United States Constitution.[1]

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1. The decision of Judge Tidwell is reported. *Roadway Express, Inc. v. Brock*, 624 F.Supp. 197 (N.D. Ga. 1985). The decision is also reproduced in the appellants' index at p. 1a *et seq.* Appellee will reference the appellants' appendix as "DOL App." with appropriate page number. References to appellee's appendix will be "App." with appropriate page number.

The action by appellee Roadway Express, Inc. ("Roadway") arose out of appellants' issuance of an order on January 21, 1985, requiring Roadway to reinstate a previously discharged employee. The order was entered after an investigation had been conducted by the United States Department of Labor ("DOL") pursuant to 49 U.S.C. §2305(c)(2)(A) to determine whether there was "reasonable cause to believe" that there was "merit" to the discharged employee's complaint that Roadway had discharged him in violation of Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §2305 ("STAA"). At the time the order was entered, the DOL had conducted an investigation and had concluded that there was reasonable cause to believe that the discharged employee's complaint had merit. The DOL had not conducted an evidentiary hearing to resolve the factual issues raised during the investigation of the case, had not permitted Roadway to review statements it had obtained from witnesses during its investigation, and had not provided Roadway with a list of the names of persons who had given such statements. The basis for the Department of Labor's denial of access to information developed during the investigation was that the identity of witnesses and their statements were confidential. DOL App. 49a.

On November 22, 1983, Jerry W. Hufstetler, a road driver based at Roadway's Lake Park, Georgia terminal was discharged for committing an act of dishonesty by intentionally creating a breakdown of his vehicle. Hufstetler filed a grievance under the collective bargaining agreement which governed his employment, alleging that he had been discharged without just cause and in retaliation for making a safety-related complaint. On January 30, 1984, the Southern Area Grievance Committee, a final and binding arbitration panel, rejected Hufstetler's claim that he had been dismissed in retaliation for reporting safety violations and determined that he had been properly discharged for committing an act of dishonesty. DOL App. 48a.

On February 7, 1984, Hufstetler contacted the DOL and claimed that he had been dismissed for reporting safety concerns in violation of Section 405 of the STAA. DOL App. 48a. The Department of Labor conducted a field investigation over a period of approximately 11 months. It interviewed witnesses, took statements and compiled "independent evidence." DOL App. 45a, 49a.

When Hufstetler made his complaint, the DOL pursuant to the statutory requirement (49 U.S.C. §2305(c)(1)) notified Roadway that he had complained to them that his discharge for an act of dishonesty was a pretext to terminate him in retaliation for making a safety-related complaint. Roadway, with no more than the charge to which to respond, submitted a position statement with evidence it felt would negate the ex-employee's allegations and show that the complainant had, in fact, been discharged for an act of dishonesty. Roadway did not have the benefit of the evidence gathered by the DOL in investigating the charge when it was shaping its response.[2]

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2. The appellee submitted a written position statement without the benefit of the evidence gathered by the Department of Labor investigators. Counsel to the appellee met with the Department of Labor investigator and Department of Labor attorneys as a follow up to correspondence complaining about what Roadway considered were unconstitutional procedures. DOL App. 49a, Complaint ¶13, Answer ¶13. The meeting also focused on Department of Labor regulations in which "the Secretary . . . recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements" and authorizes deferral to arbitration awards. *See* 29 C.F.R. §1977.18. The meeting with the Department of Labor definitely did not include a disclosure of the Department of Labor's evidence and an opportunity for Roadway's counsel to respond. Suggestions to the contrary at page 19 of the Jurisdictional Statement are neither accurate nor based on any record evidence.

Under the DOL's principle of confidentiality of informers, Roadway was denied access to written statements of witnesses interviewed by the Department of Labor during its investigation and was also refused the names of individuals from whom statements were taken by the investigator.[3]

Following the eleven month investigation, the Regional Administrator of Region IV of the Occupational Safety and Health Administration, on behalf of the Secretary of Labor, made factual determinations based on witness credibility and veracity. He made these determinations without affording Roadway the opportunity to test or challenge the testimony and evidence in some form of an evidentiary hearing. Based on secret evidence gathered during the investigation from unknown parties, the Regional Administrator of the Occupational Safety & Health Administration made the following factual determinations and factual conclusions:

> 4. On or about November 22, 1983, Respondent notified Jerry W. Hufstetler that he was discharged from employment as of November 22, 1983, principally because he allegedly had created a false breakdown, an act of dishonesty, on November 22, 1983. *Respondent's evidence to support the discharge is conjecture. Complainant has presented evidence to support his innocence. Respondent had threatened to do anything they could to catch the Complainant doing something wrong, to get rid of him.*
>
> 6. *Respondent had warned Complainant and threatened to get him due to his excessive breakdowns due to Complainant's recognition of safety violations.*

3. The statements of witnesses were not made available until after they had testified at the postdeprivation hearing. If there were any exculpatory evidence or statements gathered during the investigation, it was never disclosed to appellees by the DOL.

> 7. Respondent's termination of Complainant's employment was discriminatorily motivated by Complainant's protected activity.

DOL App. 21a-22a. [Emphasis supplied.]

Having made these factual determinations and reached these factual conclusions, the Regional Administrator on behalf of the Secretary of Labor on January 21, 1985, pursuant to the statutory mandate at 49 U.S.C. §2305(c)(2)(A), issued a Preliminary Order requiring, *inter alia*, that Hufstetler be "immediately" reinstated to his former position at Roadway. By statute this order is not stayed pending a hearing on the merits. *Id.*[4]

4. Timely exceptions to the Regional Administrator's substantive findings were taken by Roadway and pursuant to 49 U.S.C. §2305(c)(2)(A) the matter was set for hearing. A postdeprivation hearing was held before Administrative Law Judge James W. Kerr, Jr. ("ALJ") on March 26 through March 29, 1985. The substance of the ALJ's decision and recommended order on the postdeprivation hearing is irrelevant to the due process considerations here. The Secretary's attachment of his Recommended Decision and Order to the Jurisdictional Statement is inappropriate and objectionable. (DOL App. F, p. 29a *et seq.*) The appellee filed sixty-five pages of exceptions and brief to the ALJ's Recommended Decision and Order but is not burdening this record by making it a part of its appendix. However, appellee is attaching its supplemental letter exceptions to the Secretary of Labor occasioned by the Secretary of Labor's disclosure that the ALJ rendered his recommendation without the benefit of any of the hearing exhibits which either the ALJ's office or the court reporter had lost. Those exhibits included the deposition *de bene esse* of the individual who charged Hufstetler with dishonesty and who the DOL charged was retaliating against him. They also included the deposition *de bene esse* of Roadway's labor relations manager who made the final decision to let the discharge stand and proceed to arbitration. Those depositions were not read into the record but were introduced as exhibits to be read by the ALJ. Since they were lost and not read, the ALJ did not consider Roadway's testimony evidence at all. As the substantive case of retaliation turns on the motive and intent of these two individuals (to say nothing of their facts which bring into question the veracity of the testi-

(Continued on following page)

On February 1, 1985, Roadway filed a complaint in the United States District Court for the Northern District of Georgia seeking injunctive and declaratory relief. On February 11, 1985, the court entered an order granting Roadway's motion for preliminary injunction.[5] Thereafter, appellee filed a motion for summary judgment seeking a final order of a permanent injunction and a declaration that 49 U.S.C. §2305(c)(2)(A) is unconstitutional. Based on the Undisputed Statement of Material Facts (DOL App. H, pp.46a-51a), Judge Tidwell entered a final order declaring that

> the Secretary's preliminary order of January 21, 1985 is violative of the requirements of procedural due process to the extent that it requires [Roadway] to temporarily reinstate Hufstetler prior to an evidentiary hearing . . . . It is declared further that 29 [sic] U.S.C. §2305(c)(2)(A) is unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process. Accordingly, the [appellants] . . . are hereby restrained and enjoined from further issuance of preliminary orders of reinstatement pursuant to 49 U.S.C. §2305(c)(2)(A), without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process under the Fifth Amendment to the United States Constitution.

DOL App. 9a.

Footnote continued—

mony offered by the appellant), this decision, rendered without the testimony of Roadway's witnesses, has no more value from a due process standpoint than the *ex parte* Secretary's findings and preliminary order rendered by the Regional Administrator. *See* App. A2-A6, General Objections.

5. *Roadway Express, Inc. v. Donovan*, 603 F.Supp. 249 (N.D. Ga. 1985). The order is reproduced in the appendix to the Jurisdictional Statement. DOL App. B, p.11a *et seq.*

ARGUMENT

The decision of the District Court is plainly correct, and thus the question presented by appellants is so unsubstantial as to need no further argument. Title 49 U.S.C. §2305(c)(2)(A) specifically calls for the reinstatement of discharged employees following an *ex parte* determination by the Department of Labor which is based upon the resolution of disputed facts and the making of credibility determinations. The factual determinations are made and the reinstatement order is entered before an evidentiary hearing is held.

Roadway agrees with the Secretary that the resolution of the issue of whether the administrative procedures resulting in deprivation of a property interest are constitutional turns on the consideration of the three factors set out in *Mathews v. Eldridge*:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335. Jurisdictional Statement p. 12.

The Secretary does not dispute that his order of reinstatement pending a hearing results in the deprivation

of Roadway's property interests which are protected by the Due Process Clause. Jurisdictional Statement p. 11.[6] The Secretary does not dispute that an employer should be afforded the opportunity to be heard before being required to reinstate temporarily an employee, pending a formal evidentiary hearing. Jurisdictional Statement p. 12. The Secretary simply asserts that the statutorily required notice of the employee's charge, coupled with the opportunity to respond, satisfies the employer's constitutional right to be heard before it is ordered to reinstate the terminated employee.

Roadway, however, asserts that the preliminary reinstatement procedures *mandated* by 49 U.S.C. §2305(c)(2)(A) are so flawed in terms of the risk of erroneous deprivation that they are, alone, constitutionally fatal to the statutory scheme. The fundamental reason why the pre-hearing reinstatement procedure set out in the statute is unconstitutional is that the STAA calls for an *ex parte* decision-making process in circumstances which require a resolution of disputed facts (some of which are not even

6. The appellants attempt to minimize Roadway's property interest being affected. They characterize it as only a requirement that an employer pay a reinstated employee during the term of reinstatement. They say this cost is mitigated by the fact that an employer receives the benefits of the employee's labo. Jurisdictional Statement pp. 11, 14. The appellants ignore the undisputed facts that the private property interests were substantially more. The *ex parte* reinstatement order had the effect of upsetting an arbitration decision rendered under the collective bargaining agreement which had sustained the complainant's discharge for an act of dishonesty; it had the effect of displacing employees junior to the complainant on the seniority roster and bumping an employee to lay-off status. All of this was recognized and considered by the District Court as adversely affecting discipline and morale in the work place, fostering disharmony and ultimately impairing the efficiency of the business. DOL App. 7a, citing *Arnett v. Kennedy*, 416 U.S. 134, 168 (Powell, J. concurring) (1974), and *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985).

known to the employer), which turns on credibility determinations and veracity.[7] As this Court said in *Goldberg v. Kelly*, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. 254, 269 (1970). The Court then reaffirmed the fundamental principles set out in *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

397 U.S. at 270.

7. If the ALJ's Recommended Decision and Order (DOL App. F) has any relevancy to this appeal it is that it shows the array and complexity of the facts, disputed testimony, other disputed evidence, and credibility determinations which the Regional Administrator took it upon himself to resolve without the benefit of the adversarial process. *Cf. supra* note 4.

The Secretary asserts that "[t]his Court's decisions make it clear that it is sufficient for the Secretary to afford an employer notice and an opportunity to respond to the allegation of an unlawful discharge before issuing a temporary reinstatement order, so long as a prompt postdeprivation hearing also is available." Jurisdictional Statement p. 12. In support of this proposition, the appellant directs the Court's attention to the cases of *Mackey v. Montrym*, 443 U.S. 1 (1979); *Cleveland Board of Education v. Loudermill*, ... U.S. ....., 105 S.Ct. 1487, 84 L.Ed.2d 494 (No. 83-1362, March 19, 1985); *Barry v. Barchi*, 443 U.S. 55 (1979); and *Mathews v. Eldridge*, 424 U.S. 319 (1976) as the basic authority on which the Secretary relies. Each of those decisions bottoms on the facts of the individual case. They must be read in light of the fundamental "truism" concerning due process requirements which govern pre-hearing deprivation by administrative action. This "truism" was restated in *Mathews v. Eldridge*:

> "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v McElroy, 367 US 886, 895, 6 L Ed 2d 1230, 81 S Ct 1743 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v Brewer, 408 US 471, 481, 33 L Ed 2d 484, 92 S Ct 2593 (1972).

424 U.S. at 334.

The particular situations addressed in each of the appellants' authorities are inapposite to the fact situations which are found in this case and which exist in STAA Section 405 claims by the very nature of the questions

and issues raised. In the cases relied upon by appellants, the administrative decision which resulted in a pre-hearing deprivation of a property interest was based on objective evidence which did not turn on resolving disputed questions of fact, credibility, or veracity. Each of the cases relied upon by appellants recognizes this distinction. The Court, in *Mackey v. Montrym*, held that it was constitutionally proper to suspend a person's driver's license for refusal to submit to a breath/alcohol test before affording the license holder an evidentiary hearing. It was proper because the "predicates" for the suspension "are objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him." 443 U.S. at 13. Thus, the risk of erroneous deprivation was minimal.

In *Mathews v. Eldridge*, 424 U.S. 319, the Court held that an evidentiary hearing was not required before social security disability benefits could be administratively terminated. Central to the Court's ruling that there was not a substantial risk of erroneous deprivation were two considerations. First, the administrative decision to terminate benefits turned on routine, standard, and unbiased medical reports by physician specialists. A medical assessment of disability is "a more sharply focused and easily documented decision than . . . [a] determination . . . [on which] a wide variety of information may be deemed relevant, and [on which] issues of witness credibility and veracity often are critical to the decision making process." *Id.* at 343-44. Second, the procedure offered "[a] further safeguard against mistake": the person whose property interest was being terminated was allowed "full access to all information relied upon by the . . . agency." *Id.* at 345-46. Neither of these safeguards is present under 49 U.S.C. §2305(c)(2)(A).

In *Barry v. Barchi*, 443 U.S. 55, the suspension of a race horse trainer's license was sustained over contentions that it violated the Due Process Clause because the interim suspension took effect before a hearing to determine the trainer's culpability for drugging a horse.[8] The statute provided for immediate suspension of a trainer's license if certain drugs were discovered in the horse's urine after a race. Under the statute, the trainer was held to the standard of an "insurer" that the horses for which he was responsible were not administered the proscribed drugs. Thus, this Court held that the fact of drugs in the urine, which could be objectively determined by an expert, was sufficiently reliable to satisfy the constitutional requirements for an interim suspension. This holding turned on the fact that the statutory "rebuttable presumption/insurer" standard was met by objective evidence which was not subject to the resolution of credibility or veracity challenges. Thus, the Court held that a predeprivation "adversary hearing to resolve questions of credibility and conflicts in the evidence" was not required to satisfy due process requirements. *Id.* at 65.

The facts of the most recent case, *Cleveland Board of Education v. Loudermill*, also fall into the category of cases where there is no dispute of facts which requires an adversary hearing to resolve questions of credibility and conflicts in the evidence. Loudermill stated on his employment application that he had no felony convictions. During a routine investigation of his employment records his employer discovered the objective fact that he had a grand larceny conviction. He was fired by his public

8. The suspension was, however, found to violate the Constitution because, as the statute was applied to Barchi, he was denied a prompt post-suspension hearing. *See infra* pp. 14-16.

sector employer without a prior evidentiary hearing *or* any opportunity to respond to the charge on which his discharge was based. His discharge was overturned on constitutional grounds. However, the Court then noted that his constitutional right to due process would have been satisfied under these facts if he had simply been given an "opportunity to invoke the discretion of the decision maker" to consider "plausible arguments" why discharge would be an inappropriate penalty in the face of the objective fact that the information on the employment application was not true. 84 L.Ed.2d at 504-05. The concurring opinion of Justice Brennan clarified that "[f]actual disputes are not involved" in *Loudermill*. *Id.* at 511 (Brennan, J., concurring).

That the case at bar is not governed by the appellants' line of authority is clear. There are factual disputes about every element of Hufstetler's claim. The substantive underlying dispute is an assertion that Hufstetler did not commit an act of dishonesty, that the claim of dishonesty was pretextual, and that the employer's motivation for firing him was in fact retaliation for making safety complaints.[9]

The decision of *Goldberg v. Kelly*, 397 U.S. 254, offers the controlling authority for this case. *Goldberg* recognizes the constitutional principle "[t]hat the fundamental

9. This is not a case of state action on the part of a public employer as in *Loudermill* or *Arnett v. Kennedy*. Hufstetler's rights to continued employment with Roadway were derived from his collective bargaining agreement and the STAA. If Roadway and the arbitration panel were wrong in their assessment of Hufstetler's acts, he has no statutory claim to reinstatement unless there is *both* a finding that the arbitration panel was wrong in its factual determinations and that Roadway's motive in firing Hufstetler was illegal retaliation. There is also, of course, the issue of mixed motive—but for Hufstetler's alleged safety complaint, would he have been fired for committing an act of dishonesty?

requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Id.* at 267 (citations omitted). The case recognizes that the procedures required by due process vary according to the specific circumstances of the deprivation action in question. From those predicates, the Court said:

> [W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.

Id. at 269. *See also Southern Ohio Coal Co. v. Donovan, supra,* 774 F.2d 693.

Roadway was precluded from testing the credibility and veracity of the witnesses relied on by the Regional Administrator, from testing the truth or completeness of the evidence presented to the DOL investigator by the complainant, and from shaping a defense with the benefit of the record on which the appellant was making his decision to order preliminary reinstatement. For *each* of these reasons Roadway was denied the due process secured for it by the Fifth Amendment to the Constitution. The statute is unconstitutional to the extent that it mandates any one of these procedures and an order based thereon.

The fundamental reason the procedure specified in 49 U.S.C. §2305 is not constitutional is that the STAA mandates an *ex parte* decision-making process which results in a deprivation of a property interest in circumstances which require, by the nature of the questions involved, a resolution of disputed facts which turn on credibility

and veracity. Thus, the risk of erroneous deprivation is, alone, so great as to be fatal to the statutory scheme. However, the appellants, relying on a belief that the pre-deprivation procedure is temporarily sufficient, also argue that the length of the deprivation is *de minimis.* Jurisdictional Statement pp. 12, 17-18. To short circuit any discussion of this issue, they assert that Roadway cannot complain about the length of the deprivation allowed by the statute because the preliminary order affecting Roadway was struck down by injunction. *Id.* at note 9. The appellants are wrong on both points. The test set out in *Mathews v. Eldridge* is a balancing test of three factors: the weight of the private interests, the risk of erroneous deprivation, and the government's interest. 424 U.S. at 335. The period of time that an employer would be required to have a reinstated individual on its payroll is a factor to be considered in measuring the weight of the private property interest which is being taken.[10] Thus, for the constitutional consideration at bar, it is irrelevant that appellants' order was struck down by injunction as it affected Roadway.

Under the STAA, following the date of the entry of a preliminary order of reinstatement, a hearing must be expeditiously held. 49 U.S.C. §2305(c)(2)(A). In this case that was 64 days, January 21, 1985—March 26, 1985. Following the close of the hearing, the Secretary must enter an order within 120 days. *Id.* One interpretation of that requirement is that the Secretary's final order must be entered within 120 days following the close of taking evidence. *See* DOL App. 7a, Decision of Judge Tidwell. As a matter of practice, the close of the hearing

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10. *See supra* note 6 for a discussion of the elements which comprise the private property interest of Roadway which is at issue in this case.

is being interpreted by the Secretary of Labor as occurring upon the entry of the ALJ's decision and recommended order. Thus, the 120-day period referenced in the statute is a meaningless yardstick to measure the length of deprivation under current practice. The actual period of deprivation is dictated by the amount of time it takes the ALJ to issue a recommendation. Here, the ALJ's recommendation was entered October 30, 1985, seven months following the hearing which concluded March 29, 1985. Therefore, over nine months passed between the entry of the pre-hearing order of reinstatement (January 21, 1985) and any post-hearing order. Such a lengthy period of time certainly adds significant weight to the private interest being abridged by appellants' order.

CONCLUSION

"The fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. at 267. Questions of fact, credibility and veracity must be resolved in employee reinstatement cases under Section 405 of the STAA. Therefore Judge Tidwell was correct in his judgment and declaration "that 49 U.S.C. §2305(c)(2)(A) is unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process." DOL App. 9a. This statute is so clearly unconstitutional and Judge Tidwell's judgment and order so clearly correct that the question on appeal is unsubstantial and warrants no further argument.

We respectfully submit, therefore, that the appellants present no substantial question for further consideration by this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

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February 10, 1986

William E. Brock, Secretary of Labor
U.S. Department of Labor
Francis Perkins Building
Room S-2018
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Hufstetler/Roadway Express
Case No. 85-STA-8
SOL Case No. 16213

Dear Secretary Brock:

This law firm represents Roadway Express Inc., ("Roadway"), respondent in the above case. This letter is in response to the Order Remanding Case to Secretary of Labor dated February 4, 1986 ("February 4, 1986 Order") which we recently received from James W. Kerr, Jr., Administrative Law Judge ("ALJ"), New Orleans, Louisiana. The ALJ attached two lists to the February 4, 1986 Order. Exhibit A is described in the Order as a list of exhibits which have been "reconstructed." Exhibit B is described as a list of exhibits which "the parties are unable to reconstruct". The February 4, 1986 Order states that any

parties wishing to file any addition, correction or objection to Exhibits A and B or to the reconstructed exhibits must do so before February 6, 1986. (Copies of the "reconstructed exhibits" submitted to the Secretary were not enclosed with the copy of the order mailed to respondent's counsel.)

The undersigned counsel for the respondent received Judge Kerr's February 4, 1986 order by express mail on Thursday, February 5, 1986. Due to other pressing commitments, Roadway's attorneys were unable to complete preparation of this letter until today, Monday, February 10, 1986. This letter is being forwarded to the Secretary of Labor and to the ALJ by express mail, with copies sent by regular mail to the individuals listed below. It is requested that this letter and the enclosures be retained as a part of the permanent record of this administrative proceeding.

General Objections to the Procedure Followed by the ALJ

Apart from its specific objections to the ALJ's recent submission to the Secretary, listed below, it should be noted at the outset that Roadway strongly objects to the procedure which the ALJ has followed in rendering his decision in this case.

On Monday, January 27, 1986 the undersigned counsel for the respondent telephoned the Office of the Administrative Law Judges in New Orleans, Louisiana regarding the ALJ's efforts to reconstruct the missing record of exhibits in this case. Respondent's counsel spoke with Ms. Jeanine Eckholdt, law clerk to Judge Kerr, and asked whether the Office of Administrative Law Judges had ever had the exhibits of record at any time after the March 26-29, 1985 hearing. Ms. Eckholdt replied that they

had never gotten the record from the court reporters, and that they were then in the process of trying to contact the court reporters to see what had happened to the record.

Thus, it appears that in preparing and issuing his Recommended Decision and Order in this case Judge Kerr either (1) knew and failed to mention in his recommended order that he did not have any of the missing exhibits (all of the exhibits submitted by the parties at the hearing on March 26-29, 1985 and most of the exhibits submitted after the hearing), or (2) prepared and issued his recommended order without realizing that the exhibits were missing. In either event, it is clear that the ALJ did not review the missing exhibits in preparing his recommended decision, and that he has never read many of the exhibits presented by the parties at the March 26-29, 1985 hearing.

Roadway intends to prepare and file additional formal exceptions to Judge Kerr's Recommended Order and Decision based upon his issuance of the order without the benefit of the record of exhibits. However, a special point should be made concerning the deposition testimony of Michael Titus, a central figure in the factual disputes presented in this case, and perhaps Roadway's most important witness. Michael Titus was the St. Petersburg, Florida Roadway terminal manager who accused the complainant Jerry Hufstetler of committing the act of dishonesty for which he was discharged, and he is the person Hufstetler accuses of having a vendetta against him for allegedly making safety complaints. Titus gave detailed testimony about all of the facts surrounding his accusations that Hufstetler committed an act of dishonesty, and testified from a now missing videotape about the physical view he had of Mr. Hufstetler and his vehicle on the night in question.

Although a small portion of the Titus deposition was read into the record at the hearing, the bulk of the deposition was simply submitted and received into evidence in transcript form with the parties' understanding and expectation that the ALJ would read and review it before issuing his recommended decision. The court reporter had possession of the exhibits, including the Titus deposition, throughout the hearing. Since Judge Kerr never received any of the exhibits at any time after the March 26-29, 1985 hearing, it is apparent that he has never read the Titus deposition. This fact is particularly significant inasmuch as Judge Kerr's recommended decision purports to be "based upon all evidence admitted at the hearing and the post-hearing submissions." (Recommended Decision, p. 1). However, it does explain the ALJ's failure throughout his opinion to discuss the sworn testimony of Michael Titus.

Likewise, the deposition testimony of Pete Webb, Roadway's Labor Relations Manager, was not read at the hearing (on the assumption that Judge Kerr would carefully review it in reaching his recommended decision), was kept in the custody of the court reporter after being admitted into evidence, and was nowhere referred to in the ALJ's opinion. Webb was the Roadway manager who made the company's final decision sustaining the discharge of the complainant and refusing to reinstate him after a thorough joint company/union investigation had been completed.

It is Roadway's position that it would be reversible error at this juncture for the Secretary of Labor to render a final decision and judgment based upon the ALJ's belated (and unsuccessful) attempt to reconstruct the record after his Recommended Decision and Order has issued. The

ALJ's willingness to prepare and render a recommended order in favor of the complainant without even mentioning the fact that the record of exhibits was missing shows a clear bias, and an intent to render a decision in favor of the complainant regardless of what might be shown by deposition testimony and other documentary evidence supporting Roadway's position. The ALJ's Recommended Decision and Order is therefore tainted by the ALJ's demonstrated lack of objectivity and refusal to review the evidence from a fair-minded perspective and, Roadway submits, cannot be relied upon as a basis for resolving the credibility issues raised in this proceeding.

Furthermore, it would appear to be impossible for the Secretary of Labor to adequately evaluate the evidence of record without benefit of the recommendations of an ALJ inasmuch as substantial portions of the physical evidence submitted by the parties at the hearing cannot be reproduced. These missing and irreplaceable exhibits include two marker light plugs (one submitted by each party) as to which there was testimony from an expert witness called by the Solicitor's office, a trailer marker light submitted into evidence by Roadway, a photograph of a view of the complainant's vehicle (taken by his union representative) as to which there was important testimony, and a videotape of a view of the complainant's vehicle and of a walk-around inspection as to which there was important testimony from respondent's witnesses, including Titus.

Without access to this physical evidence, the Secretary will simply be unable to fairly evaluate and appreciate the testimony of live witnesses as reflected in the transcript. Under the circumstances, it would appear that a retrial of this entire matter before a different ALJ is the

only feasible remedy to the problems now presented by the fact that these exhibits are missing and by the ALJ's decision to render an opinion without advising either the Secretary or the parties that the exhibits (including the deposition testimony of Titus and Labor Relations Manager (Webb)) were missing.

Specific Objections to the ALJ's February 4, 1986 Submission

In direct response to the ALJ's February 4, 1986 Order, Roadway has the following objections and comments:

1. In Exhibit A to the February 4, 1986 Order, Def. Ex. 44 is referred to as a "three page document" with "only p. 2 unreconstructed-pages 1 and 3 attached". Page 2 of Exhibit 44 was submitted into evidence, and it can be "reconstructed." Roadway's counsel was unaware that page 2 was missing prior to receipt of the February 4, 1986 Order. A copy of all three pages of Exhibit 44 is enclosed with this letter.

2. Exhibit A to the February 4, 1986 Order refers to Def. Ex. 56 as "identified Tr. p. 1117, not rec'd." This reference is in error and apparently results from confusion with Def. Ex. 57, which was properly referenced as "identified Tr. p. 1117, not rec'd." In fact, Def. Ex. 56 was received in evidence, as indicated on page 1077 of the transcript.

3. On Exhibit A to the ALJ's February 4, 1986 order, two exhibits, affidavits of Roadway managers Thomas R. Warren and Brian M. Curran, are referred to with the notation "signed copy unavailable". Signed and notarized originals of these affidavits were submitted into evidence by Roadway after the hearing with the permission of (and

at the suggestion of) the ALJ. However, the originals were executed and mailed to the ALJ by the affiants themselves, and copies of the signed, notarized affidavits were not retained. In response to the ALJ's Order, Roadway has submitted unsigned copies in lieu of the originals. Roadway has offered and remains willing to obtain re-executed affidavits from these individuals signed and notarized with a current date, if requested by the ALJ or by the Secretary. (With regard to other post-hearing exhibits submitted by Roadway, it is assumed that the Secretary already has complete and accurate copies of the exhibits listed on the attachment to the Secretary's January 7, 1986 Order of Remand.)

4. Exhibit B to the February 4, 1986 Order (listing exhibits which are missing and cannot be reproduced) refers to Plaintiff's Exhibit 24C, a connector plug offered into evidence by the Office of the Solicitor. On Exhibit B it is stated that "Transcript index does not indicate whether rec'd in evidence. Solicitor say[s] 24C admitted per his letter of 1/21/86." Page 245 of the transcript shows that this connector plug (Pl. Ex. 24C) was admitted into evidence along with a connector plug offered into evidence by the respondent (Def. Ex. 37).

5. Exhibit B to the ALJ's February 4, 1986 Order contains references to a large number of unused exhibit numbers which the ALJ describes in the following manner "marked for identification Tr. p. 52 but not received; exhibit not described." None of these exhibits were ever referenced or referred to by any party or counsel during the hearing. These are simply documents which were premarked and exchanged between counsel prior to the hearing in accordance with the ALJ's pretrial order, but which were not utilized at trial.

6. On the last page of Exhibit B (to the ALJ's February 4, 1986 Order) the following notation appears by Def. Ex. 55: "Attachment to Titus deposition (Titus Exh. 8) not reconstructed - rec'd Tr. 1036. All other documents in Defendant's Exh. 55 have been reconstructed." Titus Exhibit No. 8 is a handwritten report signed by Michael Titus which relates to events of 11/22/83 (consisting of two pages). The exhibit was received into evidence (Tr. 1036) and a copy of the exhibit was submitted to the ALJ by Roadway pursuant to the ALJ's Order Requiring Reconstruction. An additional copy of Titus Ex. 8 is being submitted to the Secretary with this letter. Titus Exhibit No. 10 is missing, but it is not a "document." Titus Ex. 10 is a videotape used as demonstrative evidence during the testimony of two key witnesses for Roadway. As noted above, this exhibit cannot be reproduced.

7. On January 28, 1986, Roadway mailed to the ALJ copies of all documents which at that time it had been able to reproduce in accordance with the ALJ's Order Requiring Reconstruction. Enclosed with the January 28, 1986 package was a letter of explanation concerning the contents of the package, and an attached list of all of the respondent's exhibits with a description of the exhibits and respondent's understanding of the current status of such exhibits with regard to the ALJ's rulings on admissibility. On January 29, 1986 Roadway's counsel wrote a follow-up letter to Ms. Jeanine Eckholdt, law clerk to Judge Kerr, explaining certain discrepancies and corrections to its previous submission. For the convenience of the Secretary, and in order to ensure that the proper corrections to the record have been made, we are enclosing copies of this correspondence and its enclosures and attachments.

8. On January 31, 1986 counsel for the Solicitor wrote to Judge Kerr submitting corrected versions of Plaintiff's Exhibits 10 and 20 (the corrections were the deletion of handwritten notes which were inadvertently included on the Solicitor's initial submission of copies of these exhibits). Also enclosed with this letter is a copy of the Solicitor's January 31, 1986 letter to Judge Kerr (with enclosures) concerning corrections to Pl. Exs. 10 and 20.

Roadway respectfully requests that the objections and comments contained herein be fully considered by the Secretary in evaluating the current state of the record.

Very truly yours,

FISHER & PHILLIPS

By: /s/ John B. Gamble, Jr.
Michael C. Towers
John B. Gamble, Jr.
Attorneys for Respondent
Roadway Express, Inc.

cc: M. Elizabeth Culbreth, Esq.
James W. Kerr, Jr., Esq.
David E. Jones, Esq.
Eugene A. Lopez, Esq.
Jerry W. Hufstetler

Enclosures

No. 85-1530

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, APPELLANTS

v.

ROADWAY EXPRESS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED MARCH 17, 1986
PROBABLE JURISDICTION NOTED MAY 19, 1986

TABLE OF CONTENTS*

* The Secretary of Labor's findings and preliminary order, the order of the district court granting appellee's motion for a preliminary injunction, the final order of the district court, and the recommended decision and order of the administrative law judge are printed in the appendix to the jurisdictional statement and have not been reproduced.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

Civil Action No. 85-0997

ROADWAY EXPRESS, INC.,
A DELAWARE CORPORATION

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
REGION FOUR, U.S. DEPARTMENT OF LABOR

Case filed 02/01/85

DATE	EVENT
2/1/85	Plaintiff filed complaint; motion for temporary restraining order, preliminary injunction and declaratory relief; affidavit of Harry D. Webb; brief; and emergency motion for expedited hearing
2/7/85	Defendants filed memorandum in opposition to motion for temporary restraining order
2/7/85	Hearing on motion for temporary restraining order and preliminary injunction
2/11/85	Motion for preliminary injunction granted
4/3/85	Defendants filed answer
9/6/85	Plaintiff filed motion for summary judgment, brief, statement of facts, and second affidavit of Harry D. Webb
10/11/85	Defendants filed memorandum in opposition to motion for summary judgment
10/24/85	Plaintiff filed reply to Defendants' memorandum in opposition
11/18/85	Motion for summary judgment granted; judgment entered for Plaintiff
12/17/85	Defendants filed notice of direct appeal to the Supreme Court of the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. C85-997A

ROADWAY EXPRESS, INC.,
A DELAWARE CORPORATION
PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
REGION FOUR, U.S. DEPARTMENT OF LABOR
DEFENDANTS.

COMPLAINT OF ROADWAY EXPRESS, INC. FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND EMERGENCY DECLARATORY RELIEF

The complaint of Roadway Express, Inc. ("Roadway") respectfully alleges:

JURISDICTION, VENUE AND PARTIES

1.

This action for injunctive and declaratory relief arises under the Fifth Amendment to the Constitution of the United States, the Administrative Procedure Act ("APA") (5 U.S.C. § 551 *et seq.*), and Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA") (49 U.S.C. § 2305). Jurisdiction is based upon 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1361, 5 U.S.C. §§ 701-706, and for purposes of declaratory relief sought herein, upon the provisions of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

2.

Venue lies in this Court under 28 U.S.C. § 1391(e) as each defendant is an officer or employee of the United States, the plaintiff and the named defendants reside in this district, and there is no real property involved in this action.

3.

Plaintiff Roadway is a corporation organized and existing under the laws of the State of Delaware. Roadway does business and is duly authorized to do business in the Northern District of Georgia.

4.

Defendant Raymond J. Donovan ("Donovan") is and at all times relevant to this action has been the Secretary of Labor of the United States of America. In such capacity, Donovan has been and is responsible for the administration of and enforcement of the provisions of Section 405 of the STAA (49 U.S.C. § 2305). This defendant's address, for purposes of service of process by registered or certified mail pursuant to F.R. Civ. P. 4 (g)(5) is 200 Constitution Avenue, N.W., Room 52018, Washington, D.C. 20210.

5.

Defendant Alan C. McMillian ("McMillan") is the Regional Administrator of Region Four of the United States Department of Labor ("DOL"), with offices at 1375 Peachtree Street, N.E., Atlanta, Georgia 30367. McMillan has custody of DOL's original file in Case No. 4-0280-84-503(405), on STAA enforcement proceeding initiated on behalf of Jerry W. Hufstetler ("Hufstetler"), a former Roadway employee, who was discharged on

November 22, 1983. On January 21, 1985, McMillan executed preliminary findings and an order in Case No. 4-0280-84-503(405) on behalf of Secretary of Labor Donovan. By its terms, the order requires Roadway to immediately offer Hufstetler reinstatement to his former position of employment before any hearing is held.

FACTS GIVING RISE TO THIS ACTION

6.

On November 22, 1983, Hufstetler, an over-the-road driver based at Roadway's Lake Park, Georgia terminal, made a trip to Roadway's St. Petersburg terminal. At the St. Petersburg, Florida terminal, Hufstetler filed a report requesting repairs to the marker lights on the vehicle he was assigned to drive on his return trip to Lake Park. Roadway's St. Petersburg terminal manager Mike Titus called a local mechanic (not employed by Roadway) to examine and repair the vehicle, and was told by the mechanic that he believed the marker lights had been deliberately unplugged. After investigation of the incident, Titus concluded that Hufstetler had intentionally caused a "breakdown" of his vehicle in order to obtain extra pay for the time he would have to wait for repairs to be made. Titus then reported the facts of the incident to Archie Jenkins, the terminal manager at Roadway's Lake Park, Georgia facility. Later that day, based on facts reported to him by Titus, Jenkins discharged Hufstetler for an act of dishonesty. A copy of Jenkins November 22, 1983 termination letter to Hufstetler is attached to the Affidavit of Harry D. Webb ("Webb Affidavit") given in support of the Motion for a Temporary Restraining Order filed in conjunction with this complaint.

7.

On November 27, 1983, Hufstetler filed a grievance in which he claimed that his discharge was without just cause and in violation of Article 45 of the National Master

Freight Agreement ("NMFA"), the collective bargaining agreement governing the working conditions of Roadway employees represented by Teamsters Local Union No. 528 ("Local 528"), including Hufstetler. A copy of the grievance and pertinent portions of the NMFA (Sections 16 (Safety) and 45 (Discharge)) are attached to the Webb affidavit.

8.

On December 14, 1983, Jenkins and a representative of Local 528, traveled from Lake Park Georgia to St. Petersburg and jointly conducted an investigation of the grievance to determine whether Hufstetler had been properly discharged and to take testimony from witnesses to present to the arbitration panel in the event that Jenkins and the union business agent were not able to resolve the grievance at that stage of the investigation. After conducting personal interviews with all of the witnesses to the events relating to Hufstetler's discharge, Jenkins independently concluded that Hufstetler had deliberately caused a breakdown of his vehicle in order to be paid for waiting time, and therefore refused to reinstate Hufstetler as requested in his grievance.

9.

On December 19, 1983, Hufstetler's grievance was heard before the Southern Multi-State Grievance Committee ("Multi-State Committee"), an arbitration panel established pursuant to the terms of the NMFA. A copy of the transcript of the Multi-State Committee proceedings is attached to the Webb affidavit. The Multi-State Committee deadlocked, and the case was referred to the Southern Conference Area Grievance Committee ("Area Committee"), a second level arbitration panel established pursuant to the terms of the NMFA. On January 30, 1984, the Area

Committee denied Hufstetler's grievance and sustained his discharge for an act of dishonesty in creating a false breakdown at the St. Petersburg terminal. A copy of the Area Committee's decision is attached to the Webb affidavit.

10.

On February 7, 1984, Hufstetler made a telephone call to the Atlanta office of DOL. The DOL noted that he complained that he had been discharged because "the St. Pete terminal manager was upset when [he] requested costly repairs needed for truck driving safety". A copy of a written report of this telephone conversation made by a DOL Supervisor Investigator is attached as Exhibit "A". Upon receipt of this telephonic complaint, DOL began an investigation to determine whether Hufstetler had been terminated from employment by Roadway in violation of STAA, § 405 (49 U.S.C. § 2305).

11.

DOL investigated Hufstetler's complaint through an investigating officer. Pursuant to a DOL request in April, 1984, Roadway submitted a position statement explaining the circumstances of Hufstetler's discharge and the NMFA arbitration decision upholding the discharge. As part of the investigation, Roadway also provided affidavits from Jenkins, Titus, the mechanic and other witnesses.

12.

On September 7, 1984, Roadway's counsel wrote a letter to the DOL stating Roadway's position that any preliminary order reinstating Hufstetler prior to the conduct of an evidentiary hearing would constitute a denial of due process of law under the Fifth Amendment to the United States Constitution. A copy of this letter is attached as Exhibit "B"

13.

On October 18, 1984, Roadway's counsel met with DOL Supervisory Investigator and two DOL attorneys at the Atlanta office of DOL. In this meeting, Roadway's counsel pointed out that the arbitration panel under the NMFA had been presented with Hufstetler's claims and allegations that his discharge was in retaliation for his prior breakdown record and complaints but that, following a full hearing on the Company charges and employee defenses the arbitration committee had resolved the factual disputes and sustained Hufstetler's discharge. Counsel reiterated Roadway's legal position that any temporary order of reinstatement prior to an evidentiary hearing would violate Roadway's right to due process under the Fifth Amendment.

14.

Depite Roadway's protests regarding the procedures followed by the DOL in its investigation, the DOL has denied Roadway access to the written statements of witnesses relied upon by the DOL investigator in concluding that a violation of the STAA occurred, and has refused even to provide the names of such witnesses.

15.

On or about January 21, 1985, DOL rendered its Secretary Findings and Preliminary Order, attached hereto as Exhibit "C", ordering that Hufstetler be immediately reinstated to his former position as a Roadway driver prior to any hearing on Hufstetler's STAA complaint. The January 21, 1985 order also requires the payment of back pay calculated from the date of Hufstetler's discharge.

16.

On or about January 31, 1985, within the 30 day time period allowed by 49 U.S.C. § 2305 (c)(2)(A) of the STAA, Roadway filed its objections to the January 21, 1985 Secretary Findings and Preliminary Order. A copy of said Objections and Request for Hearing is attached as Exhibit "D".

COUNT ONE – INJUNCTIVE RELIEF

17.

The allegations of paragraphs 1 through 16 are incorporated herein by reference.

18.

Section 405(c) of STAA (49 U.S.C. § 2305(c) provides, in pertinent part:

* * * *

(2)(A) . . . . where the Secretary of Labor has concluded that there is reasonable cause to believe that a violation [of the STAA] has occured, he shall accompany his findings with a preliminary order providing the relief prescribed by subparagraph (B) of this paragraph. Thereafter, . . . the person alleged to have committed the violation or the complainant may, within thirty days, file objections to the findings or preliminary order, or both, and request a hearing on the record, *except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order*. . . .

(B) If . . . the Secretary of Labor determines that [an STAA] violation has occured, the Secretary of Labor shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, and (iii) compensatory damages . . . .

[Emphasis added].

19.

On January 21, 1985, Secretary of Labor Donovan, acting through his agent McMillan, ordered Roadway to reinstate Hufstetler to the position of employment he had held prior to November 22, 1983. This order was entered pursuant to 49 U.S.C. § 2305(c)(2)(A) prior to any evidentiary hearing on the record, and prior to any other hearing process which complies with the minimum requirements of procedural due process under the Fifth Amendment to the Constitution of the United States.

20.

Insofar as the provision of 49 U.S.C. § 2305(c)(2)(A) of the STAA purport to empower defendants to issue a preliminary order of reinstatement against Roadway prior to the conduct of evidentiary hearing procedures which comply with the minimum requirements of procedural due process, such provisions are unconstitutional as violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

21.

Unless defendants are immediately ordered to withdraw their preliminary order of reinstatement, Roadway will be forced to reemploy a former employee previously discharged for an act of dishonesty, thereby suffering irreparable harm as follows:

(1) By denial of Roadway's right to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States;

(2) By overturning the arbitration decision of an impartial arbitral panel established under the collectively bargained National Master Freight Corporation sustaining Hufstetler's discharge, thereby interfering with Roadway's private contractual right to manage and direct its workforce in accordance with the provisions of its collective bargaining agreement with Teamsters Local 528;

(3) By being forced to displace an innocent and honest over-the-road driver based at its fully-staffed Lake Park, Georgia terminal;

(4) By disruption of the morale of Roadway's workforce (including drivers, supervisors and management) upon the reinstatement of an employee previously discharged for dishonesty (a discharge sustained by an arbitration award), and the resulting displacement of an innocent driver;

(5) By incurring the risk that Hufstetler will continue to deliberately create false vehicle breakdowns, or other willful acts of dishonesty, thereby causing Roadway to incur substantial expenses including *inter alia* unnecessary costs of repair and unnecessary waiting time.

COUNT TWO – DECLARATORY RELIEF

The allegations of paragraphs 1 through 21 are hereby incorporated within this Count by reference.

22.

A substantial controversy exists between Roadway and defendants with respect to whether the issuance of defendants' preliminary order of reinstatement, as mandated by Section 405(c) of the STAA (49 U.S.C. § 2305(c)) constitutes a deprivation of Roadway's right to procedural due

process under the Fifth Amendment. Roadway contends that it is entitled to an evidentiary hearing in compliance with requirements of procedural due process prior to the issuance of any order of reinstatement. Defendants contend that the Secretary of Labor has such power under 49 U.S.C. § 2305(c)(2)(A) and in fact have issued and served Roadway with such an order.

23.

The parties have sufficient adverse legal interests to warrant the granting of declaratory relief pursuant to the provisions of 28 U.S.C. § 2201-2202. Due to the immediacy of harm threatened to Roadway, the court should schedule an expedited hearing on Roadway's emergency order for declaratory relief pursuant to Local Rule 220-3 of this district, and thereupon enter an order declaring defendants' January 21, 1985 preliminary order of reinstatement to be void as violative of the Due Process Clause of the Fifth Amendment.

WHEREFORE, Roadway prays for injunctive and declaratory relief as follows:

(1) For entry of a temporary restraining order, preliminary injunction and permanent injunction ordering defendants to withdraw the Secretary of Labor's January 21, 1985 preliminary order of reinstatement in STAA Case No. 4-0280-84-503(405) and further restraining and enjoining defendants from issuing any other such order until such time as defendants have conducted hearing procedures which comply with the minimum requirements of procedural due process under the Fifth Amendment;

(2) For immediate entry of a declaratory judgment (pursuant to Roadway's emergency motion for such relief, filed herewith), declaring the Secretary's January 21, 1985 order to be unconstitutional and void as violative of the Due Process Clause of the Fifth Amendment;

(3) For such further or different injunctive and declaratory relief as the court may fashion in the interests of justice.

Respectfully submitted,

FISHER & PHILLIPS

BY: /s/ MICHAEL C. TOWERS

Michael C. Towers
(Ga. Bar No. 714800)

John B. Gamble, Jr.
(Ga. Bar No. 283150)

James J. McDonald Jr.
(Ga. Bar No. 489350)

Attorneys for Roadway Express, Inc.

3500 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9200

-pational Safety and Health Administration U.S. Department of Labor

-rt of Filing of Complaint Under ...

1. Rpn. / 2. Area	— -84-033	
3. Establishment Name	Roadway Express	4. Telephone 912 559-5176
5. Establishment Address	6. City Lake Park, Ga	7. State · 8. County · 9. Zip Code 31636

10.	11. Complainant's Name (Last, First, M.I.)	12. Complainant's Address	13. Telephone No.	14. Status
	HUFSTETLER Jerry W.	Lake Park, Ga 31636	973-6058	

15. If safety/health issues involved, is inspection scheduled? ☐ Yes ☐ No	16. Last Inspection of Establishment a. Date b. ☐ S c. ☐ 11c ☐ H	17. Related Hazard a. ☐ Safety ☐ Health ☐ Both	b. Substance Code

18. If different from employer's address, where did discrimination occur?

The St Pete terminal manager was upset when the complainant requested certain repairs needed for truck driving safety, and was later terminated on a pretext of "dishonesty".

20. I certify that the Complaint was filed with me on (Date) Feb. 7, 1984

at Atlanta Region

Signature [illegible]

Title S. I.

EXHIBIT A complaint

13

EXHIBIT B

September 7, 1984

Mr. Donald I. Cameron
ORO Investigating Officer
U.S. Department of Labor (OSHA)
Jacksonville Area Office
2747 Art Museum Drive
Suite 17
Jacksonville, Florida 32207

Re: Roadway-Hufstetler (STAA Investigation),
Case No. 4-0280-84-503(405)

Dear Mr. Cameron:

This letter will confirm our telephone conversation of September 6, 1984 in which you indicated that you intend to recommend that the findings of the Secretary of Labor be in favor of the complainant in the above case. I understand that although you will present your recommendation to Supervisory Investigator, Leon P. Smith, neither Mr. Smith or the Solicitor's Office will make a final decision in the case before calling my office for further discussion of the issues. I would like an opportunity to meet with Mr. Smith here in Atlanta before the final decision is made.

From our conversation, I understand that you have not interviewed either Mike Titus, the St. Petersburg terminal manager, or Archie Jenkins, the Valdosta manager who made the decision to terminate Hufstetler. Instead, you have relied solely upon witnesses who have given conflicting sworn statements to you and to the company. For numerous reasons, I would like to discuss the facts of this case in more detail with Mr. Smith and a representative of the Solicitor's Office.

You further indicated in our September 6, 1984 conversation that you were unaware that the complainant would be automatically reinstated without a hearing if the Secretary's findings are in favor of the complainant.

STAA, Section 405(c)(2) provides that when there is reasonable cause to believe there has been a violation of the Act, the Secretary shall order reinstatement of the complainant prior to the filing of any objections to the Secretary's findings, and prior to any hearing on the record. On the other hand, the provisions of the STAA do not deprive a complainant of the right to a hearing when the Secretary concludes there is not reasonable cause to believe that a violation occurred. In that event, the complainant receives a full and fair hearing on the merits of his STAA claims for reinstatement and full back pay.

It is Roadway's position that the Secretary's issuance of a preliminary order of reinstatement prior to the conduct of a hearing on the record would constitute a denial of due process of law, in violation of the provisions of the Fifth Amendment to the United States Constitution. *See,* e.g., *Southern Ohio Coal Co.* v. *Marshall,* 464 F.Supp 450 (S.D. Ohio 1978). In the present case, there is no need to reach the constitutional issues presented by the preliminary reinstatement procedures of the STAA because there simply is not reasonable cause to believe that a violation of the STAA occurred.

Yours very truly,

FISHER & PHILLIPS

BY: _____
John B. Gamble, Jr.

JBG:jly
cc: Mr. Leon P. Smith

EXHIBIT C

UNITED STATES DEPARTMENT OF LABOR

Section 405 Complaint Case No.: 4-0280-84-503

IN THE MATTER OF:

ROADWAY EXPRESS, INC./JERRY W. HUFSTETLER

SECRETARY'S FINDINGS AND PRELIMINARY ORDER

Pursuant to Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter, "STAA") (49 U.S.C. 2305), Complainant Jerry W. Hufstetler filed a complaint with the Secretary of Labor alleging that Respondent, Roadway Express, Inc., discriminatorily fired Complainant as reprisal for complaining about DOT safety violations, (breakdowns). Respondent denied the allegation. Following an investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator, Region IV, of the Occupational Safety and Health Administration, pursuant to Section 405 of STAA, Secretary's Order 9-83, 48 F.R. 35736 (August 5, 1983), and CPL 2.45, Chapter X (March 8, 1984) finds that there is reasonable cause to believe the following:

1. (a) Respondent, Roadway Express, Inc., is engaged in interstate trucking as a part and portion of their business in Lake Park, Georgia. In the regular course of this business, Respondent's employees operate commercial motor vehicles in interstate commerce principally to transport cargo. Consequently, Respondent is subject to the STAA.

(b) Respondent, at all times material herein, has been a person as defined in Section 401(4) of STAA (49 U.S.C. 2301(4)).

2. (a) In April, 1977, Respondent hired Complainant Hufstetler to his position as a driver of a commercial motor vehicle, to wit, a tractor-trailer with a gross vehicle weight rating in excess of 10,000 pounds.

(b) At all times material herein, Complainant Hufstetler was an employee within the meaning of the STAA, in fact he was a driver of a commercial motor vehicle used on the highways in interstate commerce to transport goods and products and in that he was employed by a commercial motor carrier, and in the course of his employment, directly affected commercial motor vehicle safety (Section 401(2)(A) of STAA, 49 U.S.C. 2301(2)(A).

3. (a) On or about February 7, 1984, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him in violation of Section 405 of STAA (49 U.S.C. 2305(C)(2)(A). This complaint was timely filed.

(b) The Secretary, acting through his duly authorized agents, thereafter investigated the above complaint in accordance with Section 405 of STAA (49 U.S.C. 2305(C)(2)(A)), and has determined that there is reasonable cause to believe that the Respondent has violated Section 405(a) of STAA.

4. On or about November 22, 1983, Respondent notified Jerry W. Hufstetler that he was discharged from employment as of November 22, 1983, principally because he allegedly had created a false breakdown, an act of dishonesty, on November 22, 1983. Respondent's evidence to support the discharge is conjecture. Complainant has presented evidence to support his innocence. Respondent had threatened to do anything they could to catch the Complainant doing something wrong, to get rid of him.

5. Complainant had a two year history of bringing vehicle safety problems to the attention of the Respondent and had complained to DOT and to elected public officials. These complaints constitute protected activity under the Act.

6. Respondent had warned Complainant and threatened to get him due to his excessive breakdowns due to Complainant's recognition of safety violations.

7. Respondent's termination of complainant's employment was discriminatorily motivated by Complainant's protected activity. Thus, Respondent's discharge was a violation of Section 405(a) of STAA (49 U.S.C. 2305(a)).

8. Complainant's backpay is to be calculated from the date of his discharge, November 22, 1983, up to and including the date he either finds new employment or refuses reinstatement with Roadway Express, Inc., whichever comes first. Backpay is to be calculated and paid at $997.00 per week, which was Mr. Hufstetler's average weekly pay prior to his termination, plus 10% interest per annum on the entire amount owed.

/s/ ALAN C. MCMILLAN
Alan C. McMillan
Regional Administrator

Date: January 21, 1985

ORDER

Pursuant to Section 405 (c)(2)(A) of the Act, the Secretary of Labor, acting through his agent, in accordance with the findings made herein, orders Respondent, Roadway Express, Inc., to immediately offer reinstatement to Jerry W. Hufstetler to his former position of employment with accumulated seniority; to compensate him for backpay in an amount based on the terms of

paragraph 8 of the Findings and to expunge from his personnel records any adverse references to his discharge or any protected activity.

/s/ ALAN C. MCMILLAN
Alan C. McMillan
Regional Administrator

EXHIBIT D

UNITED STATES DEPARTMENT OF LABOR

Section 405 Complaint Case No.: 4-0280-84-503

IN THE MATTER OF:

ROADWAY EXPRESS, INC./JERRY W. HUFSTETLER

RESPONDENT'S OBJECTIONS TO THE SECRETARY'S FINDINGS AND PRELIMINARY ORDER AND REQUEST FOR A HEARING ON THE RECORD

Comes now the Respondent in the captioned matter and, having been served with a copy of the Secretary's Findings and Preliminary Order in the captioned matter dated January 21, 1985, files this its Objections to the Findings and Preliminary Order within the time called for under Section 405(c)(2)(A) of the Surface Transportation Act of 1982, 49 U.S.C. § 2305.

Responding to the numbered paragraphs of the Secretary's Findings and Preliminary Order, Roadway Express, Inc., Respondent, states as follows:

1.

Respondent admits Paragraphs 1(a) and 1(b).

2.

Respondent admits Paragraphs 2(a) and 2(b).

3.

(a) Respondent does not have sufficient information to either admit or deny the allegations of Paragraph 3(a) and therefore, holds the Secretary to strict proof of the same.

(b) Without admitting the allegations of Paragraph 3 (a), the Respondent admits that the Secretary conducted an investigation of the Complaint and issued his Findings and Preliminary Order which states that he believes that there is reasonable cause to believe that the Respondent has violated Section 405(a) of the Surface Transportation Assistance Act of 1982. Respondent admits no more.

4.

Respondent admits that, on or about November 22, 1983, it notified Jerry W. Hufstetler that he was discharged from employment as of November 22, 1983, because he had created a false breakdown, an act of dishonesty, on November 22, 1983. The remaining allegations of Paragraph 4 of the Secretary's Findings and Preliminary Order are denied.

5.

Respondent denies the allegations of Paragraph 5.

6.

Respondent denies the allegations of Paragraph 6.

7.

Respondent denies the allegations of Paragraph 7.

8.

Respondent denies the allegations of Paragraph 8.

FIRST AFFIRMATIVE DEFENSE

The allegations of the Secretary in his Findings and Preliminary Order have been the subject of a final and binding arbitration proceeding under the collective bargaining agreement between the complainant's union

and Respondent. In arbitration the same factual issues raised by complainant in his STAA complaint and alleged by the Secretary of Labor in his Findings of Fact were raised and adjudicated. The arbitration panel found against Jerry W. Hufstetler and in favor of the Respondent. The Secretary of Labor should defer to the decision of the arbitration panel.

SECOND AFFIRMATIVE DEFENSE

So much of the Secretary's Order as mandates immediate offer of reinstatement prior to a hearing on the record violates Respondent's constitutional rights to a due process hearing on the record and a finding of a violation of the Act before such an Order enters.

THIRD AFFIRMATIVE DEFENSE

The Secretary of Labor is barred from seeking the requested backpay because the Secretary delayed one year from the time Hufstetler made his STAFF Complaint until he made his Findings of Fact and said delay was unreasonable under the circumstances.

WHEREFORE, Respondent having fully objected to the Findings and Preliminary Order and having requested a hearing on the record respectfully prays that:

(a) A final Order enter dismissing the allegations of the Secretary's Findings and vacating the Preliminary Order.

(b) The Secretary defer to the decision of the arbitration panel in favor of Respondent and against complainant.

(c) Afford Respondent all other relief to which it is entitled.

Respectfully submitted,

FISHER & PHILLIPS

FISHER & PHILLIPS
A Partnership Including
Professional Corporations
3500 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9200

BY: /s/ MICHAEL C. TOWERS
MICHAEL C. TOWERS
JOHN F. GAMBLE, JR.
JAMES J. McDONALD, JR.

ROADWAY EXPRESS, INC.

Post Office Box 471
1077 Gorge Boulevard
Akron, Ohio 44309-0471
(216) 384-2321

BY: /s/ MICHAEL D. CULLINS
Michael D. Cullins

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31 day of January, 1985, caused a copy of the foregoing RESPONDENT'S OBJECTIONS TO THE SECRETARY'S FINDINGS AND PRELIMINARY ORDER AND REQUEST FOR A HEARING ON THE RECORD to be served upon the following individual by depositing a copy of said document in the U.S. Mail, postage prepaid:

ALLEN C. McMILLAN
Regional Administrator
U.S. Department of
Labor – OSHA
1375 Peachtree Street, N.E.
Room 587
Atlanta Georgia 30367

/s/ MICHAEL C. TOWERS
of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION,
PLAINTIFF,

v.

FORD B. FORD, UNDER SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
[SUBSTITUTED FOR RAYMOND J. DONOVAN,
SECRETARY OF LABOR, RESIGNED],
ALAN C. MCMILLIAN, REGIONAL ADMINISTRATOR,
REGION FOUR, UNITED STATES DEPARTMENT OF LABOR,
DEFENDANTS.

DEFENDANTS' ANSWER

Come now defendants the Under Secretary of Labor, United States Department of Labor and Alan C. McMillian, Regional Administrator, United States Department of Labor, Occupational Safety and Health Administrator, by and through the United States Attorney, Northern District of Georgia, and respond to plaintiff's Complaint as follows:

1.

Paragraph 1 is admitted, except insofar as plaintiff contends that jurisdiction of this action arises under 5 U.S.C. §§ 701-706.

2.

Paragraph 2 of the Complaint is admitted.

3.

Paragraph 3 of the Complaint is admitted.

4.

Paragraph 4 of the Complaint is denied insofar as it states that Raymond J. Donovan is the Secretary of Labor, United States Department of Labor. Paragraph 4 of the Complaint is admitted in all other respects.

5.

Paragraph 5 of the Complaint is admitted.

6.

Paragraph 6 of the Complaint is admitted insofar as it identifies Messrs. Hufstetler, Titus, Jenkins and Webb as being employees of Roadway and states that Mr. Hufstetler was terminated by Roadway. Paragraph 6 is denied in all other respects.

7.

Paragraph 7 is admitted.

8.

Paragraph 8 consists of conclusory statements which require no response. To the extent that a response is required, Paragraph 8 is denied.

9.

Paragraph 9 is admitted.

10.

Paragraph 10 is admitted.

11.

Paragraph 11 is admitted.

12.

Paragraph 12 is admitted.

13.

Paragraph 13 is admitted insofar as it states that counsel for Roadway met with representatives of the U.S. Department of Labor on October 18, 1984, and that counsel for Roadway set forth his contentions during such meeting. Paragraph 13 is denied in all other respects.

14.

Paragraph 14 is admitted insofar as it states that Roadway has been denied access to confidential statements which were provided to the Department of Labor during its investigation of Roadway and that Roadway has been denied knowledge of the individuals from whom such statements were secured. Paragraph 14 is denied insofar as it implies such denial to be arbitrary and capricious. Paragraph 14 is denied in all other respects.

15.

Paragraph 15 is admitted.

16.

Paragraph 16 is admitted.

17.

The response of defendants regarding plaintiff's contentions in paragraphs 1 through 16 are incorporated by reference herein as the response to paragraph 17.

18.

Paragraph 18 is admitted.

19.

Paragraph 19 is admitted insofar as it states that the U.S. Department of Labor ordered Roadway to reinstate employee Hufstetler in accordance with the provisions of the Surface Transportation Assistance Act. Paragraph 19 is denied in all other respects.

20.

Paragraph 20 is denied.

21.

Paragraph 21 is denied.

22.

Paragraph 22 is admitted.

23.

Paragraph 23 is denied.

Wherefore, the defendants respectfully request this Court to dismiss this action and grant such further relief as the Court may deem appropriate.

Respectfully submitted,

Larry D. Thompson
United States Attorney

/s/ J. William Boone
J. William Boone
Assistant United States Attorney

1800 United States Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30335
(404) 221-3707
Georgia Bar No. 067856

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION,
PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR;
ALAN C. MCMILLAN,
REGIONAL ADMINISTRATOR, REGION FOUR, UNITED STATES
DEPARTMENT OF LABOR,
DEFENDANTS.

AFFIDAVIT OF HARRY D. WEBB

1. My name is HARRY D. "PETE" WEBB. I am employed by Roadway Express, Inc. as Manager, Labor Relations. I am headquartered in Atlanta, Georgia.

2. In my capacity as Manager, Labor Relations, I have knowledge of the discharge of Jerry W. Hufstetler, the arbitration of the discharge and the results of the arbitration. The arbitration transcript and award is attached to this Affidavit as Exhibit 1.

3. The Arbitration Committee at the Multistate (Level 1) hearing and the Arbitration Committee at the Area hearing (Level 2) which heard Hufstetler's grievance were each comprised of three representatives from motor carriers other than Roadway and three representatives from Teamsters Locals other than Hufstetler's Local 528. By contract, the decision of the Committee is final and binding on the parties.

4. I have knowledge of the National Master Freight Agreement (NMFA), the governing labor contract be-

tween Roadway Express, Inc. and the International Brotherhood of Teamsters which covers Hufstetler and his Local No. 528. Articles of the agreement pertaining to Hufstetler's discharge and his grievance and arbitration are attached to my Affidavit as Exhibit 2.

5. I have knowledge of the requirements of the NMFA and the staffing needs for road drivers at the Lake Park, Georgia Terminal where Hufstetler was domiciled. If Hufstetler were reinstated as a road driver, under the terms of the NMFA a driver currently in the employ of Roadway at that terminal would be laid off to make a place for Hufstetler. A reinstatement of Hufstetler to his former position would also impact the opportunities for drivers who may be on layoff because of lack of work to be recalled. This would have significant adverse impact on those drivers. The reinstatement of Hufstetler contrary to the arbitration award and affecting other Teamster drivers' livelihoods before an opportunity for Roadway to be heard and defend its position would adversely impact the morale of the bargaining unit and management work force.

6. I presented Roadway's arbitration case concerning Hufstetler's discharge to the Multistate and Area Grievance Committees. As can be seen from the transcripts, Mr. Hufstetler, in addition to denying that he had intentionally caused a breakdown and committed the act of dishonesty for which he was discharged, affirmatively asserted that his discharge was motivated by retaliation for prior breakdowns and complaints. The Arbitration Committee, in denying his grievance, rejected this claim and defense.

I have freely given this Affidavit, and, to the best of my knowledge and believe, it is true, accurate and correct.

/s/ HARRY D. WEBB
Harry D. Webb

Sworn to and subscribed
before me this 31st day
of January, 1985.

[Signature Illegible]
Notary Public

My Commission Expires:
Notary Public, Georgia State at Large
My Commission Expires May 24, 1986

EXHIBIT 1

By reason of your conduct as described below, it is necessary to issue this notice of:

Warning – Suspension – Discharge – X

on

MO	DA	YR
11	22	83

Location: St. Petersburg, FL (713)

You violated our policy (or contract) by: An act of dishonesty as provided for in Article 45 of the Southern Conference Area Over-The-Road Motor Freight Supplemental Agreement to the National Master Freight Agreement by creating a false breakdown at the St. Petersburg, FL. terminal. Due to the above incident you are hereby discharged.

Subsequent violations will result in your receiving more severe disciplinary action up to and including discharge**

Previous Timely Warnings:
09-26-83 – Failure to follow inst.
08-02-83 – Failure to follow inst.
05-23-83 – Failure to follow inst.

This letter was discussed with:
Name: [Illegible] Date: [Illegible]
Supervisor: [Illegible]
Employee: [Illegible]

/s/ A. C. JENKINS
A. C. Jenkins
Relay Manager

EXHIBIT 2

GRIEVANCE REPORT

Local Union No. 528
Company employed by: Roadway City: Lake Park, Ga.
Kind of work: Road Driver X City Driver __ Other __
Date Grievance Happened: 11-22-83 Date turned into Steward 11-27-83
Stewards name receiving grievance: Gene Walker

CAUSE OF GRIEVANCE

Protest letter of discharge dated 11-22-83, in which I am accused of an "act of dishonesty" by "creating a false breakdown at the St. Petersburg, Fla. terminal". This accusation and discharge is totally without justification and thus in violation of Article 45 of the National Master Freight Agreement as it is "without just cause". I am therefore requesting that I be reinstated and paid for all time lost.

That all employees in the bargaining unit be made whole for any loss of pay or other benefits lost on account of company's alleged action in violation of the contract.

1. An employee may write his own grievance or he may have his steward or the Chairman of the Shop Committee write it for him. Make and keep one copy for yourself, give three copies to the Shop Steward.

2. When the grievance has been written, it should be given to the Steward or the Shop Chairman for handling.

3. Grievance should be written in a manner that can be easily understood.

4. By presenting the grievance, the employee grants to the Union complete authority to present, negotiate and bargain regarding this grievance and agrees to be bound by such disposition of the grievance as may be made or agreed to by the Union or it's designated representatives.

Employees Name: J. W. Hufstetler

/s/ J. W. HUFSTETLER
Signature of Employee

Please fill out all information so that we may contact you concerning your grievance if necessary.

P.O. Box 204
Street Address

Lake Park, Ca. 31636
City and State Zip Code

904-973-6058
Area Code Phone Number

STEWARDS REPORT OF GRIEVANCE

Date received: Nov. 27, 83 Date taken up with employer: _____ Date of final settlement: _____

DISPOSITION

_____ _____

_____ _____

_____

Stewards Signature _____

Approved by _____

EXHIBIT 3

who must obtain medical attention, shall receive pay at the applicable hourly rate for the balance of his regular shift on that day. An employee who has returned to his regular duties after sustaining a compensable injury who is required by the workmen's compensation doctor to receive additional medical treatment during his regularly scheduled working hours shall receive his regular hourly rate of pay for such time.

In the event that an employee sustains an occupational illness or injury while on a run away from his home terminal, the Employer shall provide transportation by bus, train, plane, or automobile to his home terminal if and when directed by a doctor.

The Employer agrees to provide any employee injured locally, transportation at the time of injury, from the job to the medical facility and return to the job, or to his home if required.

In the event of a fatality, arising in the course of employment, while away from the home terminal, the Employer shall return the deceased to his home at the point of domicile.

ARTICLE 15

Military Clause

Employees enlisting or entering the military or naval service of the United States, pursuant to the provisions of the Military Selective Service Act of 1967, as amended, shall be granted all rights and privileges provided by the Act. The Employer shall pay the Health and Welfare and Pension Fund contributions on employees on leave of absence for training in the military reserves or National Guard, but not to exceed fourteen (14) days, providing such absence effects his credits or coverage for Health and Welfare and/or Pensions.

ARTICLE 16

Equipment and Safety

Section 1.

Safe Equipment

The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition, including but not limited to acknowledged overweight or not equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified. All equipment which is refused because not mechanically sound or properly equipped, shall be appropriately tagged so that it cannot be used by other drivers until the maintenance department has adjusted the complaint. After equipment is repaired, the Employer shall place on such equipment an "OK" in a conspicuous place so the driver can see the same.

Section 2

Dangerous Conditions

Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or equipment. The term "dangerous conditions of work" does not relate to the type of cargo which is hauled or handled. [End of Exhibit Page 57]

[Beginning of Exhibit Page 119] to the Southern Conference Area Grievance Committee at any time for final decision, and such Southern Conference Area Grievance Committee shall be convened on seventy-two (72) hours notice to handle matters so referred.

Section 4

Examination of Records

The Local Union, the State or Multiple State Committee or the Southern Conference Area Grievance Committee shall have the right to examine time sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute, or records pertaining to a specific grievance.

Section 5

National Grievance Committee

Grievances and questions of interpretation which are subject to handling under the provisions of Article 8 of the National Agreement shall be referred to the National Grievance Committee in accordance with such Article 8.

Section 6

Committee Expense

Any meeting room expense involved in such proceedings shall be shared equally between the parties to this Agreement.

ARTICLE 45

Discharge or Suspension

Section 1

The Employer shall not discharge, suspend or take any other disciplinary action as respects any employee without just cause, but in respect to discharge, suspension or other disciplinary action shall give at least one warning notice of the complaint against such employee to the employee in writing by Certified Mail and/or in person and a copy of same to the Union affected, by Certified Mail: except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drinking of or under the influence of alcoholic beverages

or narcotics while on duty, and/or the failure to submit to a sobriety test upon request if the employee appears to be under such influence or carries or permits the carrying of drugs or narcotics on his person or equipment that is prohibited by state or federal law, or drinking alcoholic beverages on company property, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers, or the failure to report an accident, or willful damage or destruction of company property or equipment, or engaging in unprovoked physical violence while on Company property or while on duty. The warning notice as herein provided shall not remain in effect for a period of more than six (6) months from date of said warning notice. All warning notices, discharges, suspensions, or other disciplinary action must be by proper written notice to the employee and the Union affected. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee he shall be reinstated. The State or Multiple State Grievance Committee and the Southern Conference Area Grievance Committee shall have the authority to order full, partial or no compensation for time lost. Appeal from discharge, suspension or warning notice must be taken within ten (10) regular working days by written notice, and a decision reached within fifteen (15) days from the date of discharge, suspension or warning notice. If the employee involved is not within the home terminal area when the action of discharge, suspension or warning notice is taken, the ten (10) regular working day period will start from the date of his return to the home terminal, provided the employee returns home at the approximate time he would have arrived home if he had completed his tour of duty. If no decision has been rendered on the appeal within fifteen (15) days the case shall then be taken up as provided for in Article 44 of this Agreement.

Section 2

Any employee discharged away from his home terminal shall be provided the fastest available transportation to his home terminal at the Employer's expense.

Section 3

In all cases where an employee is unable to report for work at the regular starting time, for any reason, he shall immediately notify the Supervisor on duty. Failing to so notify the Supervisor on duty he shall not be reinstated upon his return to work unless a reasonable explanation is furnished to the Employer. The first violation of this Article shall result in a warning notice to the employee. On the second such violation of this Article employee may be disciplined or discharged. Habitual absenteeism will be grounds for discharge, after proper notice to the employee and the Union.

EXHIBIT 4

Case No. 38. Local 528 v. Roadway

Operators Committee	**Union Committee**
Scarborough	Morgan
Kinney	Lark
Skaggs	McConnell

PROTEST DISCHARGE 11/22/83 (*Jerry Hutstetler*) *Road*

Company state your name and proceed.

Pete Webb for the company. I'll read the discharge letter to Mr. Hutstetler. On 11/22/83 at St. Petersburg, Florida you violated the contract by an act of dishonesty provided for in Article 45, of the Southern Conference Area Over-the-Road Supplemental Agreement to the National Master by creating a false breakdown at the St. Petersburg, Florida terminal. In view of this you are hereby discharged. What this involved, Mr. Hutstetler was observed pulling into the St. Petersburg yard with the marker lights on his tractor working. 2 city employees at the St. Petersburg terminal said that all the lights on the unit were working and I have those statements here for the Committee. One from Mr. Doug Kimball who is a city employee at Roadway Express in St. Petersburg, Florida. Says after Bill Rativitch (sounds like) perform the drop and hook the unit was left at the dock. Ray Kimball, taking the last freight from the trailer in order for it to be empty. After Ray emptied the unit he pulled the unit away from the door around to the terminal to the front of the terminal. The lights on the unit were on. I told the terminal manager the unit was ready to go and he noticed no lights out.

Another statement also says discussion with Bill Rativitch a city employee Roadway at St. Petersburg, Florida. When Jerry Hutstetler arrived in St. Petersburg on 11/22/83 Bill Rativitch performed the drop and hook. He dropped the tractor 48780 from the trailer and hooked it to another trailer 77396. Bill Rativitch said to the best of his knowledge all the lights were working on the trailer. He said he performed a pretrip inspection on the unit. His pretrip includes checking lights and bumping tires. Bill Rativitch has been employed with Roadway since June 1979. He stated he has been a qualified driver for 20 years and he had made numerous drops and hooks and pretrip inspections. He stated that if the lights on the tractor had not been working he would have noticed it. When Hutstetler came into St. Petersburg after he was then redispatched after these hook ups we just referred to was made, he went to his unit and he was seen with the terminal manager leaning over in the cab and then at that point the tractor marker lights went out, and I'd like to read the terminal manager's statement into the record also and he says: Road drover Hutstetler came into the St. Petersburg terminal with a load of inbound. I, Mike Titus, was working inbound at the time. Due to the previous problems involving this driver I knew all the lights had to be working or he wouldn't go. I saw the unit pull into the yard and the tractor marker lights were working. Hutstetler stopped the unit and came into the office. I asked if he would go to lunch or wait for the drop and hook and then go. He said he would wait. I then had my city man drop his inbound load to the dock and took the tractor to the empty trailer that he was going to leave with. I told the city man to make sure all the lights were working. After the hook the city man pulled the unit around front. Again I saw the unit when it was in front of the terminal, the lights on the tractor were working. The city man said everything was okay so I gave the dispatch to

Hutstetler and he walked out to the unit. I then walked to the dock and from where I was on the dock I saw Hutstetler get into his unit and lean over the driver's seat towards the passenger door. It was at this time that I saw the marker lights on the tractor go out. I didn't pay much attention beyond that point since I thought he was just checking the unit or doing something with the CB radio. Shortly after that he came back into the terminal and said he had no marker lights and at this point in time gave me his M11 writeup book. I went out to the truck and tried all the lights and couldn't get them to work. I came in and called the vendor. He came over and found a wire that runs along the passenger door was unplugged. As he says in the statement the vendor was called to the terminal. We also have a statement from the vendor and Mr. (inaudible) Pierson of L & S Truck Service and it says that on 11/22/83 at 1:00 A.M. I was called to Roadway Express at 10800 Canal St. Largo, Florida to fix the marker lights on the tractor number 48780. I checked all lights and found that the wire which runs along the passenger door to be unplugged. It was apparent to me that it was unplugged as it is impossible for it to come unplugged due vibration. On the bottom he says connector plug did not have any dust on it which is as if it had been disconnected. When the wires were replugged all the lights including the dome light were working. Hutstetler made no writeup on his M11 upon arriving at the St. Petersburg terminal until after being dispatched back to Valdosta and then when the lights went out he did turn and come back to the terminal and turn in his M11 writeup and we have that M11 here for the Committee. We also have other M11s on the same truck prior to this and after this with no problems with the lights and those I'll pass up to the Committee for inspection. After the vendor replugged the wire Hutstetler pointed out a marker light on the trailer that was flickering. The vendor bumped the marker light and it stayed on and no repairs were necessary. I also have gentlemen here-

we found a plug wire in the middle of the tractor that's the same type plug that we are talking about here. It runs from the cab down to the interior of the cab and along the top of the cab and down beside the dash and this is the plug in question and it pulls apart but I don't see any way that anybody could assume that the plug was vibrated apart. Is that the plug off your tractor?

(inaudible)

I also have a picture here that shows the rightside door of the tractor and where this wire runs in relation to the door and the tractor. I'll pass that picture up to the Committee.

This is Earl Parker for local 528. The picture in question there, the local union was not aware of the picture, was not offered those pictures.

Have you seen them?

I have not seen it. This is the first I knew of it.

At any rate the wire runs down the right side of the tractor. The trailer that's in reference to in his M11 writeup that Mr Hutstetler made 77396 is the unit that Hutstetler brought from St. Petersburg to Valdosta. The fact that Hutstetler alleges he didn't write up the defect when he arrived at St. Petersburg terminal due to the dome light being out and darkness yet then writes up the M11 under the very same conditions when the dome light was out and in darkness, when he was dispatched on the clock was an indication that he was not following the proper procedure no matter how you look at it. We also gentlemen for the Commitee, Mr. Hutstetler applied for unemployment compensation and that case was heard and denied at the Unemployment Board. We have a copy of that here for the Committees review and we think that Mr. Hutstetler has deliverately created a breakdown and collected delay time and we ask the claim be denied. That's our case subject to rebuttal.

Union.

This is Earl Parker for Local 528. I'd like to make known on the record that Mr. Jerry Hutstatler is here in his behalf to answer any questions or give any testimony in his behalf. I also would like to pass out to each one of the Committee . . .

Off the record telephone. Continue union.

Gentlemen, I have some stuff here that I would like to pass out to the Committee, stuff here from 1 through 12, the company is going to use as exhibits—I mean the union is going to use as exhibits to try to go through the case.

Gentlemen, this is Pete Webb for the company. There is one exhibit in that which is a polygraph test taken by Mr. Hutstetler at his own time with nobody agreeing to it from the company and nobody present for the company and I object to it being a part of this case.

This Earl Parker for local 528. We offered the company the right to work out a situation with the polygraph test and the company refused.

We have the right because the Committee has refused to recognize a polygraph test.

We'll take out that portion.

Number 12 exhibit Joe, the last exhibit.

The very last?

Right, yes, sir.

Pass it back up there.

All right, you should have 1 through 11 exhibits for the local union. First of all I would like to read the grievance on record. This is Earl Parker local 528, grievance for Jerry Hutstetler, discharged, asking to be reinstated with full benefits and paid. Protesting letter of discharge dated 11/22/83 in which I am accused of an act of dishonesty after (inaudible) a false breakdown at St. Petersburg, Florida terminal. This occurrence after (inaudible) is totally without justification and this is in violation of Article 45 of the National Master Freight Agreement as it is without just cause. I am therefore requesting that I be reinstated

and paid for all time lost. That's where you go to union's exhibit no. 1. Mr. Hutstetler, to prove a point, had had a runin with the terminal manager prior to his discharge down in St. Petersburg. I would like for you to if you would turn to the last page in this exhibit no. 1 (turning pages) It's the last letter Joe on exhibit 1. Mr. Hutstetler sent this letter to also to the International Brotherhood of Teamsters and Teamsters Local 528 and (inaudible) Roadway Express, Akron, Ohio. Dear Sir: The purpose of this letter is to make a formal complaint against the terminal manager in St. Petersburg, Florida as a result of his making a threat against my life and safety. On 9/4/83 I was dispatched to St. Petersburg, Florida. Upon arrival at the terminal I was relieved of duty for 1 hour and given a P&D unit and ordered to go eat. On my way back to the terminal the water hose busted. I called the dispatcher at Lake Park, Georgia and informed him of the problem and told him where the unit was. He put me on hold and called the St. Petersburg terminal. After a few minutes he came back on the line and gave me the number in St. Petersburg and instructed me to call them and give them my location. The terminal manager, Mike Titus answered the phone and said: Hutstetler, what is your G . . . D . . . problem. I told him that I didn't have a problem, the truck had the problem and that he had a busted water hose. He then said I am sick of your shit and I'm going to personally see to it that you get yours then he hung up the phone on me. I immediately called the dispatcher in Lark Park, Georgia and asked him to turn on the tape recorder. I then repeated to him what the terminal manager had said to me when I had called per his instructions in order to report the breakdown. I also told the dispatcher that I considered this to be a threat against my life and safety. The relay manager now has his tape recorder. When I returned to the terminal Mike Titus came over to the truck and again told me that I am going to personally see to it that you get yours. He repeated this statement several times but never

would be specific as to just exactly what he means. If I were in your position I would see that he got his and give him his pink slip and wish him better luck on his next job. Also gentlemen, we received a letter from Mr. Norman Goldstein for our local union to investigate this letter to Mr. Hutstetler. Jerry received a letter also from the Internation which was Norm Goldstein to investigate it. We sent Mr. Goldstein a copy of the front letter on the front page a reply to Mr. Hutstetler's letter. Dear Sir and Brother: Brother Hutstetler is a road driver domiciled at Roadway Express Valdosta, Georgia. The investigation of this complaint indicated that he was told something to the effect that the company would be watching him in an attempt to terminate him. This incident occurred at the Roadway terminal—it's supposed to be St. Pete not Tampa, Florida. Brother Earl Parker, assistant business agent for local a528 had attempted to talk to the terminal manager in St. Pete, Florida but he refused to talk to Brother Parker regarding this matter. Brother Parker did talk to the district manager and his position is that the local union 528 does not need to have any discussion with the terminal manager in St. Petersburg. Brother Parker has informed Roadway Express that local 528 does not and will not condone such harassed tactics. Local 528 will continue to use any and all legal means as local 528 does for all its members to protect and represent Brother Hutstetler. We sent this letter to Mr. Goldstein—we also sent a letter to Jerry Hutstetler that we were in the process of investigating the situation.

In the beginning like the letter says, I did talk to Mike Titus on the phone from Lake Park, Georgia and Mike Titus was not—I told him who I was and he would not discuss the issue over the telephone—he said he had to get with his district manager before he would talk to me. In the meantime I talked to the district manager and what the letter said to Mr. Goldstein the district manager did tell me

that I didn't need to have any discussion with the terminal manager on this situation. That the company would take care of it. So getting back down to exhibit no 2, this is the terminal manager's statement that Pete Webb read out—me and Archie Jenkins was present when these statements was made. I went down Tuesday of last week and these statements was made in my presence from the terminal manager and the 2 union people and the vendor. At this time—on 11/22/83 road driver Hutstetler came into the St. Pete terminal with the load of inbound. Mike Titus was working inbound at the time. Due to the previous problems involving this driver I knew all the lights had to be working or he would not run. I saw the unit pull out into the yard and the tractor marker lights were working. Hutstetler stopped the unit and came into the office. I asked him if he wanted to go to lunch or wait for the drop and hook and then go. He said he would wait. I then had my city man drop his inbound load to the dock and hook the tractor to the empty trailer he was going to leave with. I told the city man . . .

Earl, I already read it into the record.

All right, let me get on to the point then. On this situation here I asked Mike Titus where did he see that the lights was out dealing with Mr. Hutstetler. We went out on the dock and Mike Titus showed us where he was standing when he seen Mr. Hutstetler leaning over in his truck as he stated in his statement. We ook a picture of where the—if you see in the picture there—between the trailer and the terminal here there is an opening right there. Mike Titus—this is a porch here that leads off into the yards where you have to go into the terminal—Mike Titus was standing approximately 45 feet from the tractor and looking in there and he claimed that he seen Jerry Hutstetler lean over. He assumes, again assumes that Jerry Hutstetler was messing with the lights or whatever. We feel like Mike Titus from that distance from where the tractor should

have been and the picture, there is no way in the world that he could see exactly what Mr. Hutstetler was doing. We feel like this statement is void saying that he seen Mr. Hutstetler bend over and again he assumed that Mr. Hutstetler pulled the wires or whatever.

The other statement from the 2 union people also Pete read into the record and I won't go read them again. The guy that hooked the trailer and tractor up and left it at the dock, he has been employed by Roadway since June 1979, stated he was a qualified driver for 20 years. The normal practice as far as the dock person, the regular dock man has not the standards to go out and pretrip a truck for a road driver. That's not the policy of a standard city man, dock man operations, that's for a (inaudible) or a fuel man but we feel like this man was not qualified to do all this and furthermore it is not his job. The other man in question that pulled the truck away from the dock, we talked to him and he stated that he pulled the tractor and trailer away from the dock, the lights was burning when he brought it around to the terminal, around to the door that the picture shows. And again, he is saying that as far as he knows he noticed no lights out. The lights could have went off when he brought the trailer around the dock, I don't know. He did not look at the trailer again once he pulled it around on the side of the door to see if the lights was burning. He got out of the truck, walked up the steps into the terminal and didn't even look at the tractor and trailer when he parked it on the side of the building. As far as the vendor is concerned, in his statement, he did indicate he came out there to fix the lights on Jerry's tractor. He also looked at everything, went under the hood, looked at the fuse box and he looked at some other wires trying to figure out why the lights wasn't burning. He also, like he said in his statement, he did find out the wire unplugged and plugged it back up and then all of a sudden the lights came on. And again gentlemen, there is no proof to the statement that Roadway—the statements that they are making towards Mr. Hutstetler that in any way that he pulled that plug out, they are assuming, that's what he done. Also, in a meeting at exhibit no. 6 that you have in front of you—meeting with Roadway, Valdosta, Georgia, time 1:30 P.M. December 14, 1983, present at the meeting was Archie Jenkins, relay manager and DeWitt (inaudible). The union people present Earl Parker, Gene Walker, Odell Moore (sounds like) the 2 job stewards and Jerry Hutstetler. The purpose of this meeting was to discuss

. . .

END OF TAPE

CONTINUE WITH CASE NO. 38. Union.

The purpose of this meeting was to discuss Jerry Hutstetler's discharge. This was a statement by Bob Steele, road driver, Roadway Express, Valdosta. Bob Steele on 11/22/83, Bob stated that he was going north and Jerry was going south about 45 or 50 minutes from the terminal. A Roadway driver was coming out of the rest area, A Carolina driver was talking on the CB that a Roadway driver marker lights was not working. Mr. Steele said that is was not him and the Carolina driver said it was the southbound driver whose lights were out. At that time Jerry noticed that he was talking about him and Jerry checked to see if his lights was working. At that time Jerry looked out on the right side and thought that his lights was burning. Jerry said a question to Mr. Bob Steele—how long has Bob drive a road (inaudible) Bob: about 5 years. Jerry: can a road driver set in the driver's seat and reach over and raise or lower the other window. Bob said no. Gentlemen, here we went out and investigated some tractors—we went out and investigated 3 different tractors of the same type at random. There is no way in the world that you can set in that seat and raise that window down. You have to get out of that seat and get over to raise the window down or whatever you're gonna do. Even the indica-

tions that the company claims that there was a possibility that Jerry pulled the plug out. You have to get out of that seat to be able to get over to the right side. Jerry: can a road driver make a marker light go out on the trailer without him getting on top of the tractor? No. This is where that the mechanic Jerry was trying to refer had to get up on top of the tractor to fix the marker light on the trailer that was out. Archie Jenkins: Bob, can a person make the light go out by putting a pen in the wire? Bob said yes. Archie: was the marker light out on the trailer? Bob couldn't see because of the trees. Jerry: can a loose wire be out from under the dash on a tractor? Bob said yes. Jerry: is it unusual to have a wire out from the dash of the tractor? Bob said no. The reason why Jerry asked this question is due to the fact that the 3 tractors that we did investigate down there on this date on December 14, 1983, had loose wires on the right side—inside the cab.

Does the marker light wire one of them?

Yes, sir.

Now, let me ask a question. Which marker light are you talking about Earl? These were bob-tail tractors?

No, these was road tractors, plain (inaudible) 48 series.

You are saying that this same light that we are in discussion with here was loose on the tractor that you looked at?

Right. All 3 of them.

(inaudible) No, none, sho wasn't.

They were plugged together . . .

They were plugged together hanging out.

That's what I'm trying to get.

I'm not arguing about the plug. They was plugged up but they was hanging out on the right side, and again some of them had plugs that wouldn't have even had a plug plugged into them. Jerry also asked Bob have you ever known me to deliver the damaged company equipment? Bob said no. Jerry asked do you ever drive a piece of equipment where marker lights and other things are wrong

with it? Bob said yes. Jerry questioned about the DOT violation. Have you ever drove equipment that you know was in violation of DOT regulations? Bob said yes . . .

The next exhibit no. 7 is another statement given by R. B. Fortwood (sounds like) for Jerry Hutstetler, also he was present at the time these questions were asked and also Archie Jenkins and myself. How long have you been a driver? Fortwood: 35 years.

How long have you drove a road (inaudible)? Fortwood, about 5 years. Jerry: can a driver raise the window down or up without getting out of the seat? These are questions he is asking Mr. Fortwood. No. To raise a window down or up the person would have to get out of the seat. This is the statement Mr. Fortwood said. Mr. Fortwood stated that he had ran with Jerry for 2 years and had not known Jerry to do any dishonest act. Jerry: have you ever been given orders to drive vehicles that were in violation of the DOT regulation? Fortwood said yes. Have you ever went to the yard and asked—checked out other equipment and the mechanic did not repair the tractor or trailer? Fortwood: yes, it is not unusual to find this. Have you ever known me to be dishonest? Fortwood said no. Jerry: did you tell them about your answers to the questions before meeting? Fortwood no. Jerry asked Mr. Fortwood this question to prove that we did not talk to Mr. Fortwood prior to the meeting about questions that we were gonna ask or Jerry was gonna ask.

Exhibit no. 8. December 14, 1983 statements of Mr. Holbrook for Jerry Hutstetler. Mr. Holbrook has known of Jerry working on headlights on tractors on a trip (inaudible) when he had to repair headlights. This took about 30 minutes. Jerry used (inaudible) knife to repair the wire. Jerry did not have tools at the time to repair the equipment. Jerry carried tools sometimes in the past like tape and a knife but when Mr. Smothers dispatched him with trailers with a broken spring on it and told Jerry that he

would dispatch him with broken springs on it and make him drive the equipment if he had been on duty. Jerry quit carrying tools about 2 months before Jerry was discharged he started to repair equipment. Jerry is not required to make any repairs to equipment under this contract. The reason why this question was asked is usually because Mr. Holbrook was present at the time that Jerry has fixed equipment, a head light on the tractors. Jerry has made numerous repairs on tractors to prevent a breakdown so we can't understand why all of a sudden he is doing something dishonest and by some of these repairs that he had made in the past that he could have got lots more costs as far as the breakdown from the company on these particular breakdowns that he repaired hisself and didn't cost the company a dime. Jerry: This is unusual to be dispatched with bad equipment when you are dispatched? Holbrook no. Jerry: is it unusual for a mechanic to repair equipment when you are dispatched? Holbrook said yes. Jerry: in the past 7 years that you have know me have you ever known me to deliberately create any form of a breakdown? Holbrook said no. Jerry: have you ever know me doing any act of dishonesty? Holbrook said no. Jerry: can a driver raise or lower the window without getting out of his seat? Holbrook said no. To raise the window down or up you would have to get out of your seat. Jerry: have you ever repaired equipment on the road? Holbrook said yes. Jerry: have you ever seen a loose wire in equipment hanging down? Holbrook says yes. Archie Jenkins: have you ever seen a loose wire on the right side of the other tractor? Holbrook said no. Jerry: will a driver drive a truck with a dome light on it—on in it on in the tractor? Holbrook said no. Holbrook stated that if he thought that Jerry made a dishonest breakdown that he would not have came down on Jerry's behalf. He also said that Jerry did not talk to him before the meeting about anything that was talked about in the meeting today. Gentlemen, when I read out Jerry's name that's where Jerry is asking the questions.

Exhibit no. 9. This is a statement from Willie Rogers (sounds like) for Merry Hutstetler 12/14/83. Mr. Rogers was not present at the time at the terminal. Willie Rogers came by my office and my secretary took his statement down. The only thing he is doing is saying the same thing Mr. Holbrook said in his in exhibit no. 8. about him and Willie being together when Jerry done some repairs on equipment. Are you saying read it? Okay.

By exhibit 10 statement of J. C. Cooley, he is mechanic, job steward at the shop. J. C. Cooley is a job steward for Lake Park Roadway terminal. Trucks are rewired at other terminals also when vendors work on trucks, wires they could vary on all equipment, due to the type of repair that was made and where the repairs were made. J. C. Cooley did not have any knowledge of any rewiring on the tractor in question on the day of the Hutstetler breakdown. We asked Mr. Cooley these questions, due to the fact that some of the wires that's in some of these tractors the vendors or mechanic to whatever need to suite them at the time they repair them. They could run straight, wire them together where there wouldn't be no connection plugin or they could fix it properly where there would be a plugin type connection or wire it anyway they wanted to when they get the equipment on the road.

Also there is statement in exhibit no. 11 of G. D. Walker. He is the job steward, road driver steward. These are tractors in random that we checked out on the yard there on 12/14/83. Tractor no. 48083. This will acknowledge that on this date, I Gene Walker, checked this tractor in reference to wiring in question which was a factor (inaudible) connection bounded on the passenger side of the tractor. The wire was exposed from the dash panel and had no clips or lock joints devises inside the connection. Thus I feel like under these set of circumstances the connector could have been disconnected due to the vibration of the vehicle over many miles or normal opera-

tion. Tractor 4859. This tractor was checked by myself also in reference to the same problem. The wiring in question same as above in reference to the connection. Had a clip or lock joint type connection and could not be separate by hand. On this particular tractor Mr. Jenkins hisself got up in the tractor, tried to disconnect the wire in question, it had a lock type connection to it and he couldn't pull it apart. That's the reason why we went on to other tractors. Tractor no. 48111 had wires hanging down or exposed on the passenger's die but this was not the same wire previously mentioned on tractor no. 480083 and 48519. These three tractors also 48000 series was chose at random.

Gentlemen, all the investigation that I have done on this case I feel that, the local union feels that Mr. Hutstetler was discharged improper. We feel that Mr. Hutstetler did not do nothing dishonest and again like I said awhile ago we feel like the company is making statements here that they think Mr. Hutstetler done this. We feel like Mr. Hutstetler did not do anything wrong. We feel like Mr. Hutstetler's breakdown was legit and the total breakdown time was I think $6.40 something cents involved. I don't think a man would lose a job of $35 or $30,000 job for $6.50. Again, the company is assuming that Hutstetler pulled these connections out, they do not have proof that Mr. Hutstetler done it, the didn't catch him doing it. We feel like the discharge is improper. Mr. Hutstetler have you got anything you would like to add?

I got a lot I want to add to that.

Mr. Hutstetler, give your name for the record, please.

This is Jerry W. Hutstetler. I have worked for Roadway Express for about 7 years. I got so much to say I don't known where to start. But I'll—about 2 months prior to this when Mike Titus expressed to me that he was going to personally see to it that I got mine. Now if you could see this fellow and be around him and know him, he is not like

the average person, he is like a spoiled kid you know, and only a spoiled kid would come up to a grown person and say I'm going to personally see to it that you get yours and point their finger in your face. If I told somebody that I would being expecting them to whop my ass right then and there but that is the mentality, the childish emotional problem he has got, so he's got a problem. I got a copy here of my W-2 form. I made $48,829.67 last year and not one dime of that money was stole or even one penny was got through any act of dishonesty. I work 7 days a week everyday for the last 3 years. I have pulled 14 to 18 different trailers per week. I've been off less than 15 days in the last 3 years. I've drove more miles each year in the last 3 years than any other driver in Lake Park. I have over 7 months accumulated time that I can mark off and like I said before, not one penny of that $48,000 was made through any act of dishonesty. I have not put even one scratch on Roadway's equipment and drove almost a million miles without an accident, and in reference to lights problems. I point out there's 46 lights on a Roadway 45-foot tractor trailer combination to go out and cause a breakdown. There are 18 tires, 18 wheels and 18 wheel bearings, 360 lug bolts and nuts that could cause a breakdown and probably several hundred feet of wiring and wiring connections that could cause a breakdown. So you got all these problems to contend with on the truck and there was reference made to the marker light on the trailer you know, well the mechanic had to climb up on the roof of the tractor to take that light out—well he took it out halfway and it flickered on and off, he would push it back in and it would go out, you pull it back out and flicker on and off push it back in it would go out. He had to take this light completely out in order to make repairs. He took it out and scrapped the connectin andput it back in and it stayed on. There is no way that I could have made that light go out unless I climbed out up there and took it

loose. You just can't make a light go out you know. I don't know of any way to make one out. Now this incident happened 2 months ago when Mike Titus said he was going to personally see to it that I got mine I broke down and he told me this on the phone, well I got upset and I called the relay back and told them to turn the tape recorder on and repeated everything that he said and the next day I asked the dispatcher what he did with the tape and he said he gave it to Archie Jenkins said it was on his desk, which is the relay manager. So there is no doubt that Archie Jenkins knew about this situation prior to him discharging me and the point made of that is that he shouldn't have ever discharged me in the first place cause he knew about the situation in Lake Park all along. But getting back to St. Petersburg. After I hung up the phone the dispatcher toldme to walk on back down to the truck and he would call and make sure that he was sending a mechanic cause I didn't know what he was gonna do, he just hung up the phone on me. So I walked on back to the truck and they sent a girl that worked in the office in her car to pick me up. Well, when I got back to the terminal the mechanic was working on the lights on the trailer see, and I was standing beside the tractor and he come over there again and pointed his finger in my face and says I'm going to personally see to it that you get yours. Now, he says you've got more breakdown time than other terminals got running time. I said that's not true and it's not you know. I says you don't know what you're talking about, you don't know who you are talking to, you can't put me in the same classification of a regular driver, you know, I work everyday. I drive many more mile than anybody else, I'm certain to have more breakdowns. The average bid driver pulls 6 trailers a week. I pull 14 to 18 different trailers. You've got a lot more to contend with everytime you hook to a different trailer and then when you consider Roadway's management policy of repair they've got a policy of

juggling defective equipment up and down the road. You get a trailer that's got a defect on it and they don't want to fix it, they want to get it out of their area and put it off on somebody else, in fact they will even tell you that, get the hell out of here, we don't want to fix it, get the hell out of here and let it tear it up on somebody else, you know. So that's what you got to contend with there and after he told me that he personally was going to see to it that I got mine uh, him with his childish emotional problems that's what he did. That's my position, there's no doubt about it. Now let me tell you uh what happened on the trip that I left from Lark Park to St. Petersburg. All right. I went on call at 0.75 on the 21st which is 45 minutes after 12:00 midnight on the 21st. Okay. By a quarter to four the dispatcher give me work call and she immediately told me said she had been busy and she looked at my card wrong and she thought 075 which is 45 after 12 midnight meant 45 after 12 noon and that would make me available for the 3:00 call instead of the 12. She said she had been busy, made a mistake and run around me. Well this dispatcher is a woman and she had been sick the last couple of days and had passed out in the terminal and I knew this and she asked me said are you gonna file a grievance on me. That was 3 hours she run around me. I said no don't worry about it, you just forget it. 3 hours $40.00. Now do you think I would give up $40.00 to drive to St. Petersburg and tear up a truck, pull the wire out of a truck in order to get 6 hours and ½. It just don't make sense. There ain't nomathamathics is just not there and then on 11/17 about 5 days prior to this I was dispatched to St. Petersburg and the (inaudible) spring broke and the truck was getting full throttle. I had another spring under the floor board somehow which would cause it to go all the way forward-getting full throttle and so I stopped and called in and uh, I tried for 1 hour to get a mechanic in Tampa and St.

Petersburg, they couldn't get a mechanic. The dispatcher told me, said I can't get nobody at home, ain't nobody home. She said do you think you can fix it yourself, you know. I said yeah, I think I can fix it, I says I'll try, so by sticking the toe of my shoe on the accelerator and pulling it back I was able to drive to the terminal. Okay. The dock supervisor was the (cough) only terminal person on duty there, management person. He got some wire and a flash light and watched as I wired the accelerator spring back. Now if I had been wanting to get break down time I could sit on the side of the road for no telling how long until they could get a mechanic. She told me, said we can't get one in Tampa or St. Pete. I could have set there for no telling how long. That was just 4 or 5 days prior to this. All right. On 10/30 I was dispatched on a run and my headlights went out. This is in reference to Willie Raush and Ron Holbrook statement just a minute ago and they stopped (inaudible) I talked to them on the radio and told them my lights went out. We checked everywhere and couldn't find the problem and so I borrowed Will Raush's knife and I cut the wire on the lights and hooked em into the circuit breaker and got some lights on dim, I had me some dim lights. Okay I drove the truck all the way to Miami with dim lights, I wrote it up in the writers book and Mr. Webb mentioned the writeup book like it's a big deal you know. There's nobody at Lake Park that (inaudible) writers book on a turn run and if you doubt my word you can check the field line (sounds like) you won't find it, nobody and when people do write in the book like they are going to Miami they don't fix it see, so I drove the truck all the way back to Lake Park on dim see, and also you are supposed to sign the back of the writers book when you leave Lake Park. Nobody does that but me. I'm the only one there that does it and I do it every trip and I checked the book and I noticed nobody else did it, or I'd have seen the signature on the previous pages, nobody does that. So don't let it blow

smoke on you like this is a big deal, you know. He is trying to give his side and I'm telling you the facts. Okay. This happened on 10/30 about the lights—I fixed the head lights and I didn't have to do that, I didn't have to drive them on dim, that's a DOT violation. Okay. On 10/10 I had another problem with head lights. I got down to (inaudible) and my head lights was going on and off, on and off and I stopped at the scale house there and I called the dispatcher, and I say my head lights are going on and off but they are on right now you know. He waited awhile and he says I can't get you no vendor there I ain't got no vendor. He said you reckon you might drive down to Lake City and maybe I'll get a vendor there. I said that's what I'll do, I'll drive to Lake City and you call there and see if you can get a vendor you know, and I'll call you back when I get there. Well, I got the truck driven all the way to Lake City, lights didn't go out the first time so I didn't stop. All right. I got south of Lake City and they started again, on and off, on and off. Then I stopped at a truck stop just below Lake City. Just before I got to the truck stop the lights went out and I called him back. I said well I didn't stop at Lake City because they stayed on. I thought I'd make it. He said I can't get a vendor there either you know, and so he said you reckon you can fix it, I says I don't know I'll see, I'll what I can do. So I opened the hood and checked the oil line over there and found the problem. The wires next to the radiator and this was an old city truck, and due to the heat of the radiator caused all the insullation to crack off the wires and it was so bad you couldn't even wire it up. It was ridiculous to try and wire it up so what I did I just pulled all the wires apart, you know, and got it where it wouldn't short out and drove it on. Drove to Orlando, drove that way and back and the next day I saw a mechanic and he said it took him a solid day to rewire that truck, it was just so bad you know. And while I'm on the wire it is just nothing unusual to get in a

Roadway truck and see wires hanging down here and there you know, upon the dash you know. It's not a problem at all and I have drove these trucks these old model Whites, they've got aluminum or metal accelerator pedal and when you put enough miles on the pedal will bend to one side and it will strike the brake pedal, and I drove those things and you could look down and see fire all down there. When the accelerator pedal hit the brake pedal it would make fire under there you know so the mechanics do they take the (inaudible) and cut part of the accelerator pedal off so it would fit (cough). You have all kinds of wiring problems on Roadway trucks and the main problem that causes these problems is management themselves, they are not fixing these trucks, they don't want to fix em, they don't want to fix em, they just want to drive the trucks up and down the road and then when a driver has breakdown time they come up there and try to blame it on the driver you know, like it was the driver's fault. Now, the fuel man told me one day, he told me that the shop foreman was getting on to him because he checked the trucks and the drivers come by there and found something wrong with it and he was getting on to him about it, and he blew up at the shop foreman and told him, he said, I'm getting sick and tired of Archie Jenkins betting in there and harassing them drivers you know and making em check these trucks and come out here and breaking down and him jumping on me. It's management causing this problem you see. So you can see just because a mechanic might check the truck or whatever don't mean the lights are working or in proper working order. To give you an example of that. I remember one time checking a truck going out leaving for Lake Forest, went out and checked the truck and the dang tail light was hanging out of the socket by the wire by maybe about 8 or 10 inches, just hanging down out of the socket you know and the mechanic just checked the truck. What they do, the mechanics and the switchers at these

other terminals they are not switcher, like Earl said, they are cock workers. They go out there and they're in a daze, they go out there and they don't even look at nothing, they just hit the fires maybe and a light can be out and the four of the marker lights on the cab of the tractor is so (inaudible) you wouldn't hardly notice you know, it is something that you just wouldn't notice by all of them being out. If you had to rule that one of them was out and the others on you might notice, but the fact that all of em was out you probably wouldn't notice. So it is not unusual at all to be dispatched with a truck and the mechanic just checked it and found all kinds of defects with it. I checked a truck one day and it had 2 flat tires on it. I remember checking it one day and the wheels was busted in three sections,the whole wheel was fixing to come off. I have checked them and the lug bolts backed off, the wheel was about to run off see. So . . .

Execuse me. Okay.

Now, the specific day I left Lake Park, let's get this straight, the specific day I left I went and clocked out and got in the truck, walked around and checked, every light on that truck was working, had the dome light on and everything and I stood in front of the truck a few minutes and the fuel man named Charlie, I said Charlie it looks like everything is working on this trip and he said yeah, said I didn't find nothing wrong with it when I checked it you know. He said but if this little marker light on the fender is not working we don't have to fix that. I said who told you that and he said I'd rather not say. Because Charlie is the fuel man and he can't read and write and he is going—they told the shop foreman what I just told you about the relay manager getting the drivers upset and making them breakdown and he told me later, I'm not going to say nothing no more cause they'll be firing me. So when I asked him who told you that and he said I'd rather not say.

So I said I know who told you that, Archie Jenkins told you that, I said he told Bob Steele and Phil the same thing and Bob Steele told if he didn't fix his dome light he wouldn't give him no writeup either cause he couldn't see how to write. So I said Charlie you've fixed a lot of tail lights out here hadn't you, he said yes, that's right, and I said—I mean tag lights, and I said you know the tag lights have gotta work, you know the marker light has gotta work and that dome light has gotta work, he said yeah, you're probably right about that but ain't nobody told me no different. So I got in the truck and left. Now my procedure is, every trip, this has never failed and when I first heard about this I thought Archie Jenkins had set me up to fire me and I'll tell you why. Every trip I leave I get the truck and tractor lined up straight. I pulled up to the stop sign about 100 feet from the stop sign and stop and I see my trailer in the mirror to see if my mirrors is set so I do this every trip, it never fails. My mirrors wasn't in line so I put on the brakes and you can't just turn around in the seat to get over there, you got to pick your foot up and step over because the doghouse covers the engine, it's right here beside the seat and so you gotta stand up to see and pick your feet up and stand up over there and maneuver around the gear shift leaver to get over there to roll the window down. All right I turn on the dome light, I did this maneuver like I'm telling you, got over there and holding my hand on the door I took my left hand and turned the window crank and rolled the window down and adjusted my mirror and rolled it back up. I noticed everytime I turned the crank that the back of my hand was hitting something you know, so I looked down to see what it was and there was a wire coming out, just making a U turn out of the corner of the dash, there's a little crack about 3 inches wide in the corner of the dash, maybe 6 or 8 inches high and there's some wire that's poked up in there you know and there is more than one, there's several wires up

in there, I noticed this wire, did not see no broke section on it, no plug in or anything, it was just a perfectly good wire come out and made a U turn. So the reason I looked cause I could see it, I wanted to see what was hitting my hand and I saw it you know and I said just the wire I thought it went to the heater, I thought it went to the heater because there is nothing else over there that would—any kind of electrical device cause the heater is right under the dash there. So I thought nothing about it. I turned the dome light off and got in the seat and got out on the road, on the interstate. Well I drove about maybe 30 miles or something like that and I looked out checking my mirror I noticed that I didn't have my mirror just right. I hadn't adjusted it just proper so I just stopped down at the truck stop at Lake City and I'll just adjust it again there cause I'm real particular about my mirror because the mirror needs to be adjusted straight and I've had several instances where if I hadn't had my mirror adjusted proper I could have had an accident so this is the procedure I do all the time. Originally I thought that maybe Archie slipped out there and pulled the wire or got the wire leal loose so my hand would hit it on purpose, that was what I was thinking when I first heard about this discharge you know. I felt suspicious about them characters up there but anyway, I stopped down at the truck stop in Lake City and I did the same procedure over, I got up out of the seat and got over there cause you gottan get up out of the seat, you can't reach it from the seat, I got up on the right side and rolled the window down and again my hand was hitting that wire, I didn't look this time cause I knew what it was. I knew what it was, I paid it no attention, but I remember hitting it so I got to my mirror and rolled the window back up and I wasn't at the truck stop but a few minutes and come back out and then I left. Well, I got on the road. I'd say about 30 minutes later I reached up and turned on the dome light was gonna see what time it was you know.

Now in your own mind, I'm not trying to blow smoke on nobody, I want everybody to use their own judgment on this, you are grown people you can decide for yourself. Is it reasonable for a driver to turn on the dome light to see what time it is? Is that an unreasonable act or is it reasonable. I was on a trip for about 250 mile trip and wouldn't you think a driver would turn on the dome light to see what time it is on a 250 mile trip at night see. All right. You make your own decision about this, this is what happened. Reached up and turned on the dome light to see what time it was, the dome light didn't come on so I pulled the bulb out. The bulb in the city tractors is a long bulb about as big as your little finger and maybe two inches long and it fits in 2 clips. I just reached and pulled it out and stuck it up there in front of the instrument light . . .

END OF TAPE

THIS WILL BE A CONTINUATION OF CASE NO. 38, Local 528 v. Roadway. Union continue.

Okay. After leaving the truck stop I turned on the dome light to see what time it was, it wouldn't come on so I pulled the bulb out and put it in front of the instrument light thinking the bulb was blowed. I was gonna see if I could see the filiment blowed in there but the truck was vibrating so bad I couldn't tell. I had the little side vent open on the left there and I said it's just a blowed bulb, and I pulled my hand back and started to throw it out the window but I said no, I said I might be throwing away a perfectly good bulb, you know, I don't want to do that, so I said I'll just put it back in the fixture and let the mechanic check it when I get back to Lake Park. All right. I put it back up in the fixture and I thought well it maybe the just the switch was bad so I flipped a little switch on the side of the fixture a bunch of times and it didn't flicker on not even one time so I just the switch like it was but I left it in the position cause I didn't know whether it was on or off.

Okay. I continued on the trip. I got about 45 minutes from St. Petersburg and I stopped to rest about 5 minutes. I got back on the highway there and about 5 trucks come around me real fast cause I was going kind of slow and they already had their speed built up and come around me real fast. (inaudible) and the same instant there I was meeting the St. Petersburg bid driver Bob Steele who just left St. Petersburg and he was going north. He said hell, my marker lights ain't out here cause I'm setting here looking at them. Well later on he told me that he has problems with his legs and he is a short fellow and he sits low in the seat and he was looking at reflections on the reflector glass bug shield on the hood see and he could see them but I never have seen my marker lights from that angle cause I'm taller and I set with my seat all the way up and never noticed them. He said hell, my marker lights ain't out, I'm setting here looking at em, the driver come back and said I'm talking about the southbound, well I kind of tried to look and see if I have or not I could see em in my trailer, they were working. I couldn't see em on the roof I didn't know if they was working or not but I flipped the switch and my radio antenna was mounted on my mirror bracket right beside the door. I looked out and I could see a faint flow of light on my antenna and I think, well the switch is just stuck cause that is not unusual for the switch to stick so I thought I had corrected the problem. I thought I had it corrected and thought nothing else about it. I thought the problem was corrected. So I got. So I got down to the terminal in St. Petersburg and I punched in and he asked if I wanted to go to eat or go to unch and he said it won't be but just a few minutes, you want to go to lunch or wait. So I just waited. Well, the switcher come and got in the truck and dropped out to the trailer and hooked it to the other truck and I was just kinda walking out in the yard there, illing time waiting, and I could see the truck, the second trailer from the door there, and they were unloading freight on it. I had to wait about thirty minutes for them to

unload the freight see. What had happened the switcher went and switched the truck out and checked the lights supposedly and then later on the dock worker drove the truck around to the front of the terminal see. The truck sat there about 30 minutes roughly while they were unloading freight, I could see em running in and out there with a forklift or eomthing, they was moving big boxes in and out of the trailer see and so I waited around there and I was standing on the porch, the entrance to the terminal maybe a 6 × 6 porch maybe 4½ feet higher then the ground level with the ground about dock level and I was standing on the porch and the switcher pulled the truck around and uh he cut the engine off and saw me standing there and he cranked the engine right back up you know and got out of the truck, come on in the terminal. Well when he got out I went on it and punched my pay card, I already had my pay card already and the switcher didn't go in there and tell Mike Titus it's okay or nothing because when he come in, got out of the truck, I punched out and went and checked my truck. Well I walked around the truck and checking the truck and I saw the lights out. Well, uh, I went and got back in the truck and made a little writeup and I keep the writeup book right in front of the steering wheel. Well I couldn't see how to write so I get the writeup book and hold it up against the windshield cause the lights was on around the terminal and I could see to write—you got the terminal code number at the top and then you got a big space at the bottom and I just opened my log book and laid it on the steering wheel, I just wrote all the marker lights on the tractor out, you know, just kinda in the dark, just king of at random like that. He called a mechanic and it didn't take the mechanic long to come there and I told him—now to the best of my belief I told him when he came there that you gotta fix the marker light on the trailer too now. I'm not gonna swear to that but I believe I told him that you know. I'm pretty sure, I said you got to fix the marker light on the trailer too and

uh he uh checked around the circuit breaker-box there under the steering wheel for a few minutes and got back in the seat and looking around, looking around up around the headlight and all trying to see where the wire—any wire exposed I guess he saw the wire in front of the door handle. The reason all them questions about the door handle, can you roll up the window was asked because the wire was in front of the door handle. If you couldn't reach the window crank you couldn't reach the wire because the wire was in front of the window crank see. So he got out of the seat, completely out of the seat, just like I was telling you I had to do and worked around the gear shift lever there to get over there and connected the wire. I was standing on the ground and when he connected the wire the marker lights on the cab come on and the dome light came on at the sametime. I said what was the problem, he said just a loose wire come unplugged, that's all he said. Now he didn't stay there long enough to look for no finger prints or dust prints at all, he connected the wire. Now what would you think a mechanic would do. Would he connect the wire then look around here to see if I see any finger prints on that wire? Of course, he connected it—he done his job then got out. Well, I said that was what was wrong with the dome light too. I said I thought the bulb was blowed. So he got out of the truck and I said don't forget the marker light on the trailer cause like I said, I believe I told him when he got there so he climbed up on the exhaust pipe and got on the roof of the tractor. By this time Mike Titus came back of the terminal, standing over there on a little porch and walked (inaudible) climb up on the roof of the tractor and pulled a marker light out. Well the marker light was flicking on and off, he pulled it out and it would flicker on and off and you push it back in it would go out, he did that about three times then pulled it all the way out and scraped off the neck and put in back in and it stayed on. So I went back in punched the clock got

my delay time and 4800 less than half an hour. Drove all the way back to Lake Park, I got there—I left close to 1:00, got to Lake Park maybe a quarter after six, punched out, went on home, went to bed. About a quarter after three the dispatcher called me and said he was reading me a letter of discharge for an act of dishonesty by creating a false breakdown. He was real apologetic about it, he said I'm really worry about this and all, wel there ain't no hard feelings between me and you, you know and he said well, Archie Jenkins, relay manager is on vacation and it's up to me to fire you, you know. I mean, that was coming from the boss—I said we ain't got no hard feelings you know and that's pretty much how it was. So you know, I went and filed a grievance and all and on the 8th of December. Now Mr. Webb mentioned the employment office up there. I went to the employment office to put in for unemployment benefits. All right, Archie Jenkins shows up there and he puts this big speel like Mr. Webb just did on you all about me not signing the writeup book. Well, they denied my benefits, said you failed to follow a work order. Well the lady up there said that's no big deal, said they are gonna deny it on any little legitimate thing they think is legitimate see. Anything to keep from paying, they are going to deny it see. So I went and filed an appeal and the appeal is to be heard later but anyway to get to the point when I met Archie at the employment office—I've been knowing Archie for about 5 years now and you don't know somebody for 5 years and not kind of pick up a little bit of vibrations there or whatever about they react when they are told different things. So I was settin there and I asked him—I read the statement that Mike Titus had signed and uh he said he saw me come into the terminal and the marker lights on the cab was on and I told Archie, I said a person wouldn't notice whether them marker lights was on or not unless they was particularly look for them, you know. Then I read further in the statement and said he

saw me bend over in the seat and saw the marker lights go out. I said Archie, that's a lie, I said I didn't even bend over the seat, he didn't see me do that. I said he is lying to you, I said Archie you have known me for about 5 years, hadn't you, and he said yeah—said have you ever known me to lie to you? He said no, not that I'm aware of and I said I'm not lying to you now—sayd Mike Titus is lying to you and I can prove it. Then I told him about meeting Bob Steele and the conversation on the radio and I said did you know about that? He said no, I didn't know about that and I told him about the dome light being out. I said I knew the dome light was out, I said I didn't have to create a breakdown to get to Lake Park, I already knew the dome light was out and I knew they didn't have no bulbs down there. I said I didn't have to create a breakdown to get to Lake Park, I already had a bredkdown I was aware of. The dome liught was out. I knew it you see, so I didn't have to tear up the truck. Then I asked him I said did you know the marker light was out on the trailer, the top of the trailer. He said no, said he didn't tell me that either. I said ain't that kind of strange you know, he wasn't thinking about all that and I said he was just trying to do what he had threatened to do, he was just trying to see to it that I got mine, trying to fire me. That's all he is trying to do, and so the muscles in his face starting twitching and he started squirming around in his chair you know. He said me, when is that Committee hearing gonna be and I knew what was on his ming right then, he realized he had done fired a man for no reason at all. I had done been off for 2 weeks and had 2 weeks to go and he was gonna have to reinstate me and it just tore him up, I could see it you know. Cause he learned the facts then, he hadn't even been told the facts when I was discharged. But really when he discharge me, I've known Archie Jenkins for about 5 years, now Archie Jenkins wouldn't have discharged me if he had saw me bend over in the truck and saw those lights

go out unless he had saw me pull the wire. He wouldn't have discharged me and the reason he discharged me, he had his ass covered. Archis Jenkins is a CYA man if you know what I mean, cover your ass, now he don't make a move without covering his ass. Now Mike Titus had done messed up and Archie was on vacation at the time and he knew it wouldn't be any reflection on him if he could make it stick fine you know and if he didn't it would be Mike Titus' ass not his see. So he had known me for 5 years, he had never been aware of my creating any breakdown, I have never created any breakdown, in the 7 years I've been there at Roadway and he had never known me to lie to him. Now, I'll bring out one final point.

Off the record, telephone ringing.

Okay.

I'll bring out one point, final point, about – I mentioned Archie had knowed me for 5 years and never known me to create any breakdown or even lie to him. I went and had a polygraph test made and uh Mr. Webb kept you all from hearing that you know, and you might want to know why he kept you from hearing. We don't want to mention that. Okay, but anyway I was told by the fellow that give me that test that . . .

Mr. Hutstetler unless you have some new evidence that hadn't been introduced into the record, I think we've got a pretty good picture of what happened.

That's all I can think of. That's how everything happened.

This is Earl Parker with Local 528. I got two comments I would like to make or whatever. I want you to remember now that this happened at 1:00 A.M. in the morning, it was at night. Like I state awhile ago in the picture there Mike Titus-that's a day time picture that we took, 45 feet away from the tractor when he claimed he seen Jerry Hut-

stetler leaning over or whatever, assumed that he done this. I feel like this, if the company had assumed or thought that Jerry Hutstetler dishones or caused the breakdown, dishonestly, they should have fired in right on the spot, not waited until he finished the trip and went home and then discharged him. I feel like if Roadway thought he actually done it, dishonesty, they would have fired him right on the spot. That's the union's case at this time, subject to rebuttal.

Company rebut.

Pete Webb for the company. We didn't discharge him because we didn't know that the vendor had simply replugged the thing before he left and we thought it best to keep him on (inaudible) the quickest way had it happened, but to kind of refute to the fact that Mr. Hutstetler claims he is a perfect employee. Well, first of all I would like to say that we don't have fuelers or hostlers at Rampa, all these people are qualified city employees who do the drop and hood for road drivers and who do it daily and they are constantly doing that and they are qualified to make pretrip inspections and they can tell when marker lights are burning or not. The violation that some of these guys refer to here in these statements that they take that they said that they had made DOT violations, I think all of them refer to the fact that for a period of time we instructed them to pull the two 45 foot double trailers into the terminal at Miami rather than dropping them at the place designed for that along side the parkway out there, but we did find out about a month after we started that we couldn't continue to do that because of Florida law but we did go back to the end of that drop area and start going it again and I think that's the violation that they are referring to. I think Roadway has been to this Committee many times with discipline taking to mechanics who do not repair units, giving warning letters and road drivers dispatch and come back and there is something wrong that

the mechanic should have repaired—I don't know of the trailer light deal, we are not accusing Mr. Hutstetler of doing anything to the trailer lights and the statement that I read to you and the people down there say that all the mechanic did was bump the trailer light a couple of times and it came on. I would like to read to you a couple of statements here the supervisors to dispel the fact that Mr. Hutstetler was a perfect employee as he claims . . .

This is Earl Parker with Local 528. Gentlemen, I was not present when these statements were made from supervisors . . .

I was not present when he made the claims that he's making that he has done all these things either and we have other things to verify these.

Archie Jenkins was present when these statements was made.

Are these statements from supervisors?

Yes.

You can read them in the record.

Well, I was not present. How could we argue the point what he's reading and that we couldn't ask the supervisors questions?

Wll, how can I argue the point of these things he's talking about?

Archie Jenkins was present, at the time all these statements was made, the relay manager was present.

I'm talking about the things that Jerry is talking about, these breakdowns that he supposedly did . . .

Was the union offered those statements? Given a copy of those statements?

I don't know.

No, I didn't know he had them.

Well, I'll let those statements go, I will read a statement that was written to Archie to the job steward. Now this is from the job steward in Valdosta, and It's dated September 11, 1983.

This is Earl Parker with Local 528. Gentlemen, I didn't know mothing about this statement.

It says copies to the steward and Local 528 . . .

Well, I think this is improper due to the fact that I was not presnet when this statement was given or whatever reason the job steward or whoever [Illegible] to them. I think it's improper.

It is rebuttal to the fact that Mr. Hutstetler has made some things—that he repairs trucks etc. He brought up one particular one that happened back in September, the allegation that he made to the terminal manager and this was an attempt to explain it to him by the relay manager who told the steward that he would like to meet with Mr. Hutstetler. The steward went to Mr. Hutstetler and this is the response we got from the steward in writing with a copy to Local 528 and linehaul drivers. This per the steward Mr. Gene Walker one of which of those statements he read in here and I assume he gave a copy to the union since he is a steward.

Whatever you are gonna read I don't know what you are gonna read, I don'g . . .

Whether he did or didn't is not my fault.

The whole thing on this is that I was not present. I asked Archie Jenkins when I left Wednesday night at 8:00 when he got through. With all this I stayed down there from 1:00 to 8:00 investigating this whole situation. I asked him when I left did he have anything pertaining to Jerry Hutstetler's case that I didn't have and he said no, you got everything.

Then you have got this, according to your job steward.

When was this taken?

September 11.

September 11?

We didn't take it. He came and gave it to us.

Does it show a copy to the union?

Yes, it does.

I have not seen a copy from the steward. I don't even know what it's about. I indicate again, I asked Archie Jenkins, the relay manager at 8:00 Wednesday night did he have anything else pertaing to Jerry Hutstetler, I wanted copies of it. He said no, you got everything. I went and spent almost 11:00 Wednesday night and had all these statements typed up and carried them—my secretary personally carried them down and gave them to the relay manager that night with a statement that Bob Steele and all them made—now I think they should show me the same courtesy. When I ask for stuff I should be able to get it. Now you know . . .

I suppose he assumed that you had it since since it came from the steward.

Now, if he had shown it to me . . .

It really had nothing to do with this particular incident just as those things . . .

Well, I don't think it's fair to this gentleman to be able to read something there from the job steward even though it might pertain to this case or not to pertain to it. I don't think it's fair to me personally due to the fact that he's my job steward.

Well, if you feel that way Earl, I won't read the thing, but I will read some other facts that I've got into the case that shows Mr. Hutstetler through 10 period of 1983 has been paid $1,292.38 in breakdowns on 57 breakdowns for 98.28 hours delay time. The next closest employee has been paid $289.00 in breakdowns. Mr. Hutstetler in 1982 at one point, since he has brought up his perfect record, was broke down down in Florida somewhere and we told him to-after he was repaired and his rest was up, we told him to bring the unit home and he took it to his house.

Well, this case was heard at the Committee level, and it was denied.

everybody talking at once.

To get back to the facts of the case, two union people have stated that the lights were working. A vendor has stated he went to the truck, the plug was unplugged . . .

Your old supervisor the terminal manager . . .

Wait a minute. Let him finish this case Earl.

I'm not talking about that now. The plug was unplugged and it would not have vibrated loose. That's our case.

Those people are assuming that you know, that it was he that done it. You don't have no proof on the man. Your terminal manager stated down there in front of me and Archie . . .

That's the facts of the case.

Is there anything new to be entered into the record?

No, sir I don't have nothing unless Mr. Hutstetler has anything.

Mr. Hutstetler do you have anything further to add that has not already been stated to this Committee?

Well, I think everything has been fairly well covered. The only thing that I can say is in reference to what Mr. Webb said about all this breakdown time . . .

everybody arguing.

Stay on the case that we have before us which is a discharge case. Do you have anything further to add?

I would like to ask Mr. Webb is that breakdown time or does that include delay time, picking up bills and when you break down have to go in bed for 8 hours?

It's breakdown time.

That's what I'm talking about. All that time he is talking about when you break down and you run out of hours you gotta go to bed. Now here is the situation they used to do.

I understand that.

Yeah. They used to let you be relieved of duty see and then the relay manager wouldn't let me be relieved of duty on a breakdown, he would make me log it on duty. That caused me to run out of hours, I'd have to go to bed. He was trying to harass me—for some reason he thought it

was gonna keep the truck from tearing up, see. But I've never in my life tore up a Roadway truck and you can believe that.

Executive session.

DECISION: Case 38. IT IS THE DECISION OF THE COMMITTEE THAT THE CASE IS DEADLOCKED TO THE AREA.

Case No. 38. Discharge Agenda, December 19, 1983
Southern Multi-State Grievance Committee

EXHIBIT 5

Case No. 7 Local 528 v. Roadway

Operators Committee	**Union Committee**
Pulliam	Morgan
Graham	Smith
McIntosh	Davis

The transcript of the Multi-State hearing will be made a part of the record. If the parties have anything to add at this time state your name and proceed for the record.

Earl Parker for Local 528. Mr. Webb in the transcript stated that Mr. Hufstettler applied for unemployment and it was denied. He appealed it—I got copies of the letter from the Employment Board and they did grant him his unemployment. I would like to pass it up to the Chairman of the Committee. That's all the union has got to add.

Company?

WEBB: The company has nothing further to add.

All parties excused.

DECISION: Case No. 7 DENIED, COST TO THE UNION.

Case No. 7. Discharge Agenda, January 30, 1984
Southern Conference Area Grievance Committee

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

File No. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION, PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR; ALAN C. MCMILLIAN, REGIONAL ADMINISTRATOR, REGION FOUR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

AFFIDAVIT OF LEON P. SMITH

County of Fulton
State of Georgia

1. My name is Leon P. Smith. I am employed by the United States Department of Labor, Occupational Safety and Health Administration, as the Regional Supervisory Investigator of the 11(c) Section in Atlanta, Georgia.

2. In my capacity as Supervisory Investigator, I have knowledge of the Department of Labor's procedures for the conducting of investigations under § 405 of the Surface Transportation Assistance Act of 1982 [49 U.S.C. § 2305] [hereinafter the "Act"]. I also have knowledge of the Department's investigation conducted under the Act into the complaint of Jerry W. Hufstetler, which complaint was filed on February 7, 1984. The field investigator who investigated Mr. Hufstetler's complaint was Don Cameron of my staff.

3. In the investigation of cases under the Act, the Secretary of Labor, through the Occupational Safety and Health Administration, utilizes experienced investigators

who conduct a substantial investigation to determine whether a complaint has merit. Under existing investigatory procedures, the persons alleged to be primarily responsible for the discriminatory action are afforded the opportunity to fully state and support their positions. Additionally, the assigned field investigator is required to verify the complainant's allegations through credible, independent evidence. The investigator's report is then reviewed by the regional supervisory investigator, and, where a complaint is found to have merit, by the Occupational Safety and Health Administration's Regional Administrator and by attorneys within the Office of the Solicitor.

4. The investigatory and review procedures outlined in paragraph 3, hereinabove, were utilized in full in the investigation of Hutstetler's complaint under the Act, and led to a finding on behalf of the Secretary of Labor of reasonable cause to believe that Hufstetler's complaint had merit.

I have freely given this Affidavit, and, to the best of my knowledge and belief, it is true, accurate and correct.

/s/ LEON P. SMITH
Leon P. Smith

Sworn to and subscribed to before
me this 6th day of February, 1985.

/s/ EVELYN W. BAKER
Notary Public
My Commission Expires: 12-13-87.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. C-85-997A

ROADWAY EXPRESS, INC., PLAINTIFF,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR; ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION 4, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

SECOND AFFIDAVIT OF HARRY D. WEBB

1.

My name is Harry D. Webb. I am employed by Roadway Express, Inc. as Manager, Labor Relations, headquartered in Atlanta, Georgia. I have been employed by Roadway for twenty-three years. For the past 7 years I have had responsibility for handling grievances brought by Roadway employees, including road drivers, under procedures established pursuant to Articles 43-45 of Southern Area Conference Over-the-Road Supplemental Agreement to the National Master Freight Agreement ("NMFA") (*See* Exhibit "A").

2.

As Manager of Labor Relations, I am responsible for a geographic area which includes Eastern Tennessee, and all of Georgia, Florida and Alabama. Approximately 700 to 800 road drivers work in that geographic area for Roadway. Roadway operates nationwide and has substantial numbers of drivers working out of terminals throughout the continental United States. By any measure, Roadway is one of the nation's largest over-the-road carriers.

3.

In handling NMFA grievances for Roadway I consult with the local manager of the terminal where the grievance is filed, gather facts and prepare the company's side of the case, and represent the company at arbitration panel hearings. In my geographic area, the first level of hearings is before the Southern Multi-State Grievance Committee. This Committee is composed of three members from the management of trucking companies other than Roadway, and three members from the International Brotherhood of Teamsters, none of which is from the local union representing the grievant. A decision reached by the Multi-State Committee is final and binding upon both the union and the company. Decisions are reached by a majority vote. In the event of a deadlock, the case automatically goes to the second level grievance committee, the Southern Area Conference Grievance Committee. Its composition and voting procedures are the same as the Multi-State Committee. In the event of a deadlock at the Area Committee, the case would proceed to a National Grievance Committee. In the event the National Committee's failure to reach a decision by majority vote the parties would have the right to resort to economic action (i.e. strike or lockout).

4.

Multi-State Committee meetings are held on the fourth Monday of each month. In discharge cases, the cutoff date for submitting a grievance for a hearing during any month is the 15th; therefore, at a maximum, discharge cases are ordinarily resolved at the Multi-State level within approximately five weeks after grievances are filed. Area Committee meetings are held quarterly. Depending upon the exact date of the scheduled Area Committee meeting, cases which proceed to the area level are ordinarily resolved within three months after a deadlocked Multi-State decision. Decisions rarely, if ever, proceed to the national

level; in my experience more than 98% of all cases, including discharge cases, are resolved at the Multi-State or Area levels.

5.

In discharge cases, when a grievance is filed, the grievance automatically goes to arbitration under the provisions of the NMFA. Although either the union or the company may waive its right to an immediate hearing at the next available Multi-State Committee meeting, this is almost never done in discharge cases since the employee is not being paid and the company continues to have liability for back pay prior to resolution of the dispute. Under the NMFA, both Multi-State and Area grievance committees have authority to reinstate employees with full, partial or no compensation for time lost. When the Area or Multi-State Committee finds in favor of an employee in discharge cases, the employee is reinstated.

6.

Roadway attempts to keep its terminals fully staffed, but not overstaffed, with the number of road drivers needed to handle existing business. Therefore, when a road driver is discharged, a driver is hired to replace him when such action is justified by economic conditions. When a driver is subsequently reinstated by order of an NMFA Committee or otherwise and an extra driver is not needed at the driver's home terminal, a driver at that terminal is then laid off in accordance with the terms of the NMFA.

7.

This affidavit is given to be used as evidence in support of Roadway's Motion for Summary Judgment in the above-styled case. The facts recited herein are based upon my personal knowledge.

/s/ HARRY D. WEBB

Harry D. Webb

Subscribed and sworn to
before me this 4th day
of September, 1985.

[Signature Illegible]

Notary Public

My Commission Expires: 6-30-88

interline terminal at point of destination of his run when the terminal of his own Employer is closed.

Section 5.

Time Off

The Employer shall provide in his dispatch rules and/or procedure suitable provisions relating to time off at the home terminal.

Any procedure or rule agreed to shall not be less than the following: When an extra board driver is available for work or works for a period of seven (7) days, the Driver will be entitled to thirty-six (36) hours time off for the seven (7) day period. If a driver elects to take less than thirty-six (36) hours off, this shall constitute a day off. If the Driver elects not to take the time off, these days will be accumulated. Not more than fifteen percent (15%) of the extra board drivers at the terminal involved shall be permitted to be off for any reason, excluding vacations, at the same time. Accumulated days off and seniority shall determine the employees entitled to time off.

Section 6.

Use of Lease Equipment

Certificated or permitted carriers shall use their own available equipment together with all leased equipment under a minimum thirty (30) day bone fide lease arrangement with owner-operators on a rotating board, before hiring any extra equipment.

Section 7.

Extra Contract Agreements

(a) The Employer agrees not to enter into any other agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement.

Company Rules

(b) The Employer is permitted to make and enforce any reasonable Company rules which do not conflict with the provisions of this Agreement. All such rules shall be posted for a period of seven (7) days and the Local Union shall be furnished a copy of such rules prior to posting. [Illegible].

ARTICLE 43.

GRIEVANCE COMMITTEES

Section 1.

The Employers and the Unions, parties to this Agreement, shall together create and maintain permanent State or Multiple State Committees covering the States covered by this Agreement. The State or Multiple State Grievance Committees shall remain as now established unless changed by mutual agreement between the parties to this Agreement. It shall be the function of these Committees to adjust the disputes which cannot be settled between the Employer and the Local Union. The State or Multiple-State Grievance Committees shall consist of an equal number of members appointed by Employers and Unions, but not less than three (3) from each group. Each group may appoint alternates to serve in the event of absence of permanent members.

When a State or Multiple State Grievance meeting is called, it shall be compulsory for each member of the Committee or the alternate to attend. Each State or Multiple State Grievance Committee shall meet within fifteen (15) days after either group Committee Chairman serves written notice on the other requesting a meeting [End of Page 97 of Exhibit].

[Start of Page 102 of Exhibit] or the Southern Conference Area Grievance Committee shall have the right to examine

time sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute, or records pertaining to a specific grievance.

Section 5.

National Grievance Committee

Grievances and questions of interpretation which are subject to handling under the provisions of Article 8 of the National Agreement shall be referred to the National Grievance Committee in accordance with such Article 8.

Section 6.

Committee Expense

Any meeting room expense involved in such proceedings shall be shared equally between the parties to this Agreement.

ARTICLE 45.

DISCHARGE OR SUSPENSION

Section 1.

The Employer shall not discharge, suspend or take any other disciplinary action as respects any employee without just cause, but in respect to discharge, suspension or other disciplinary action shall give at least one warning notice of the complaint against such employee to the employee in writing by Certified Mail and/or in person and a copy of same to the Union affected, by Certified Mail; except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drinking of or under the influence of alcoholic beverages or narcotics while on duty, and/or the failure to submit to a sobriety test upon request if the employee appears to be under such influence, or carries or permits the carrying of drugs or narcotics on his person or equipment that is pro-

hibited by state or federal law, or drinking alcoholic beverages on company property, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers, or the failure to report an accident, or willful damage or destruction of company property or equipment, or engaging in unprovoked physical violence while on Company property or while on duty. The warning notice as herein provided shall not remain in effect for a period of more than six (6) months from date of said warning notice. All warning notices, discharges, suspensions, or other disciplinary action must be by proper written notice to the employee and the Union affected. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee shall be reinstated. The State or Multiple State Grievance Committee and the Southern Conference Area Grievance Committee shall have the authority to order full, partial or no compensation for time lost. Appeal from discharge, suspension or warning notice must be taken within ten (10) regular working days by written notice, and a decision reached within fifteen (15) days from the date of discharge, suspension or warning notice. If the employee involved is not within the home terminal area when the action of discharge, suspension or warning notice is taken, the ten (10) regular working day period will start from the date of his return to the home terminal, provided the employee returns home at the approximate time he would have arrived home if he had completed his tour of duty. If no decision has been rendered on the appeal within fifteen (15) days the case shall then be taken up as provided for in Article 44 of this Agreement.

Section 2.

Any employee discharged away from his home terminal shall be provided the fastest available transportation to his home terminal at the Employer's expense.

Section 3.

In all cases where an employee is unable to report for work at the regular starting time, for any reason, he shall immediately notify the Supervisor on duty. Failing to so notify the Supervisor on duty he shall not be reinstated upon his return to work unless a reasonable explanation is furnished to the Employer. The first violation of this Article shall result in a warning notice to the employee. On the second such violation of this Article employee may be disciplined or discharged. Habitual absenteeism will be grounds for discharge, after proper notice to the employee and the Union.

ARTICLE 46.

EXAMINATIONS AND IDENTIFICATION FEES

Section 1.

Physical, mental or other examinations required by a government body or the Employer shall be promptly complied with by all employees, provided, however, the Employer shall pay for all such examinations. The Employer shall not pay for any time spent in the case of applicants for jobs and shall be responsible to other employees only for time spent at the place of examination or examinations, where the time spent by the employee exceeds two (2) hours, and in that case, only for those hours in excess of said two (2) hours. For all other examinations, physical or mental, not required by law the employee shall be paid at the hourly rate for time spent at the place of such examination, except for those examinations required when a employee is returning to employment after illness or injury. Examinations are to be taken at the employee's home terminal. Employees will not be required to take examinations during their working hours.

The Company reserves the right to select its own medical examiner or physician, and the Union may, if it believes an injustice has been done an employee, have said employee re-examined at the Union's expense.

In the event of disagreement between the doctor selected by the Employer and the doctor selected by the Union, the Employer and Union doctors shall together select a third doctor within seven (7) days, whose opinion shall be final and binding on the Company, the Union, and the employee. The Company nor the Union nor the employee will attempt to circumvent the decision. The expense of the third doctor shall be equally divided between the Employer and the Union. Dispute concerning back pay shall be subject to the grievance procedure.

No employee shall be required to take any form of lie detector test as a condition of employment.

Should the Employer find it necessary to require employees to carry or record full personal identification, such requirement shall be complied with by the employees. The cost of such personal identification, shall be borne by the Employer.

ARTICLE 47.

MEAL PERIOD

Employees may take one hour total for meals in each ten (10) hour period. No employee shall take more than one (1) hour total during such ten (10) hour period or be compelled to take any part of such one (1) hour before he has been on duty three (3) hours or after he has been [End of Page 105 of Exhibit].

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C-85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION,
PLAINTIFF,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR; ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION FOUR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to the provisions of L.R. 220-5(b)(1), N.D. Ga. and in support of its motion for summary judgment filed herewith, defendant Roadway Express Inc. ("Roadway") submits its statement of material facts as to which there is no genuine issue to be tried:

1.

Roadway is a common motor carrier engaged in interstate trucking as a part of its business in Lake Park, Georgia; as a part of its business, Roadway employees operate commercial motor vehicles in interstate commerce principally to transport cargo; Roadway therefore is subject to the provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA"), and to defendants' efforts to enforce the provisions thereof. (Complaint, ¶ 15, Ex. C; Answer, ¶ 15).

2.

On November 22, 1983, former Roadway employee Jerry W. Hufstetler was discharged by Roadway Express Inc. for an alleged act of dishonesty. (Complaint, ¶s 5, 7; Defendant's Answer, ¶s 5, 7).

3.

On November 27, 1983, Hufstetler filed a grievance under the provisions of the National Master Freight Agreement, a collective bargaining agreement governing the working conditions of Roadway employees at the company's Lake Park Georgia facilities who are represented by Teamsters Local Union No. 528 ("Local 528"). (Complaint, ¶ 7; Answer, ¶ 7).

4.

Discharge cases filed as grievances under the NMFA ordinarily are resolved at a first level arbitration panel hearing or within three months thereafter if a deadlock occurs at the first level (Multistate) and the case proceeds to a second level arbitration panel (Area). (Second Webb Aff., ¶¶ 4-5).

5.

Under the NMFA, Multistate and Area arbitration panels have the right to reinstate discharged employees with full, partial or no compensation for time lost; when such panels find in favor of a discharged employees, the employee is ordered reinstated. (Second Webb Aff., ¶5).

6.

When Roadway drivers are reinstated by order of a NMFA committee or otherwise, and an extra driver is not needed at the driver's home terminal, a driver at that terminal is laid off in accordance with the terms of the NMFA. (Second Webb Aff., ¶ 6).

7.

On December 19, 1983, Hufstetler's grievance was heard before the Southern Multi-State Grievance Committee ("Multi-State Committee"), an arbitration panel established pursuant to the terms of the NMFA. (Complaint, ¶ 9; Answer, ¶ 9).

8.

The Multi-State Committee deadlocked and the case was referred to the Southern Conference Area Grievance Committee ("Area Committee"), a second level arbitration panel established pursuant to the terms of the NMFA. (Complaint, ¶ 9; Answer ¶ 9).

9.

On January 30, 1984, the Area Committee denied Hufstetler's grievance and sustained his discharge for an act of dishonesty in creating a false breakdown at Roadway's St. Petersburg, Florida terminal. (Complaint, ¶ 9; Answer, ¶ 9).

10.

On February 7, 1984, Hufstetler filed a telephonic complaint with the Atlanta office of the United States Department of Labor ("DOL") in which he complained that he had been discharged because "the St. Petersburg's terminal manager was upset [when he] requested costly repairs needed for truck driving safety." (Complaint, ¶ 10; Answer, ¶ 10).

11.

Upon the receipt of this complaint by telephone, the DOL began an investigation to determine whether Hufstetler had been terminated from employment by Roadway in violation of Section 405 of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 2305. (Complaint, ¶ 10; Answer, ¶ 10).

12.

DOL investigated Hufstetler's complaint through an investigating officer; pursuant to DOL's request during the investigation, Roadway submitted a written position statement with supporting affidavits explaining the circumstances of Hufstetler's discharge and the NMFA arbitration decision upholding the discharge. (Complaint, ¶ 11; Answer, ¶ 11).

13.

On September 7, 1984 Roadway's counsel wrote a letter to DOL stating Roadway's position that any preliminary order reinstating Hufstetler prior to the conduct of an evidentiary hearing would constitute a denial of due process of law under the Fifth Amendment to the United States Constitution. Complaint, ¶ 12; Answer, ¶ 12).

14.

During DOL's investigation of Hufstetler's complaint, DOL denied Roadway access to written statements of witnesses provided to DOL during its investigation of Hufstetler's complaint on the grounds that such statements were "confidential," and denied Roadway knowledge of names of the individuals from whom statements were taken by the DOL investigator. (Complaint, ¶ 14; Answer, ¶ 14).

15.

Defendants' procedures for determining whether to issue temporary reinstatement orders pursuant to 49 U.S.C. § 2305(c)(2)(A) include a field investigation by an assigned DOL employee, a review of the investigator's report by a regional supervisory investigator, and, where the investigator finds the complaint to have merit, by the Occupational Safety and Health Administration's Regional Administrator and by attorneys with DOL's of-

fice of the Solicitor; such procedures do not include an evidentiary hearing on the merits of the complaint prior to issuance of such a temporary reinstatement orders. (Affidavit of Leon P. Smith, ¶ 3).

16.

To date, DOL has established no regulations or other procedures whereby on evidentiary hearing is to be conducted prior to DOL's issuance of pre-hearing preliminary orders of reinstatement pursuant to 49 U.S.C. § 2305 (c)(2)(A). (Smith Aff., ¶ 3).

17.

On or about January 21, 1985, DOL rendered its Secretary's findings and preliminary order ordering Roadway to "immediately" reinstate Hufstetler to his former position as a road driver prior to any hearing on Hufstetler's STAA complaint; the January 21, 1985 order also required payment of back pay calculated from the date of Hufstetler's discharge. (Complaint, ¶ 15,19; Answer, ¶s 15, 19; Smith Aff., ¶ 4).

18.

On or about January 31, 1985, Roadway timely filed its objections to the January 21, 1985 Secretary's findings and preliminary order pursuant to 49 U.S.C. § 2305(c)(2)(A). (Complaint, ¶ 16; Answer, ¶ 16).

19.

A substantial controversy exists between Roadway and defendants with respect to whether 49 U.S.C. § 2305(c)(2) (A), insofar as it purports to empower and require defendants to issue preliminary order of reinstatement prior to the conduct of an evidentiary hearings, is unconstitutional and void as violative of the minimum requirements of procedural due process under the Fifth Amendment: Roadway contends that the due process clause of the Fifth

Amendment requires that an evidentiary hearing be conducted prior to the issuance of any order of reinstatement; defendants contend that the Secretary of Labor is constitutionally empowered and required under 49 U.S.C. § 2305(c)(2)(A) to issue and enforce such preliminary orders of reinstatement without such a hearing. (Complaint, ¶ 22; Answer, ¶ 22).

Respectfully submitted,

FISHER & PHILLIPS

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By: JOHN B. GAMBLE, JR.
Michael C. Towers
(Ga. Bar No. 714800)
John B. Gamble, Jr.
(Ga. Bar No. 283150)

Attorneys for Roadway
Express, Inc.

96

In the Supreme Court of the United States

No. 85-1530

WILLIAM E. BROCK, SECRETARY OF LABOR, AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
APPELLANTS

v.

ROADWAY EXPRESS, INC.

APPEAL from the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

May 19, 1986

U.S. GOVERNMENT PRINTING OFFICE 1986—491 507 20523

No. 85-1530

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, APPELLANTS

v.

ROADWAY EXPRESS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE APPELLANTS

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QUESTION PRESENTED

Whether Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), which provides that the Secretary of Labor—upon a finding of "reasonable cause to believe" that an employee in the motor transportation industry was discharged in retaliation for the employee's safety complaints—"shall" order the temporary reinstatement of the employee pending a hearing regarding the reasons for the discharge, is invalid under the Due Process Clause of the Fifth Amendment because the Secretary is not required to afford the employer an evidentiary hearing before issuing the temporary reinstatement order.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1530

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, APPELLANTS

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OPINIONS BELOW

The order of the district court (J.S. App. 1a-10a) is reported at 624 F. Supp. 197. The prior order of the district court granting appellee's motion for a preliminary injunction (J.S. App. 11a-19a) is reported at 603 F. Supp. 249. The Secretary's findings and preliminary order (J.S. App. 20a-23a) are unreported. The recommended decision and order of the administrative law judge (J.S. App. 29a-43a) are unreported.

JURISDICTION

The judgment of the district court (J.S. App. 24a) was entered on November 18, 1985. The notice of

appeal to this Court was filed on December 17, 1985 (J.S. App. 25a-26a, 27a-28a). On February 6, 1986, Justice Powell issued an order extending the time within which to docket this appeal to and including March 17, 1986. The jurisdictional statement was filed on that date, and this Court noted probable jurisdiction on May 19, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 405(a) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(a), provides:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

3. Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), provides:

> (1) Any employee who believes he has been discharged, disciplined, or otherwise discriminated against by any person in violation of subsection (a) or (b) of this section may, within one hundred and eighty days after such alleged violation occurs, file (or have filed by any person on the employee's behalf) a complaint with the Secretary of Labor alleging such discharge, discipline, or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify the person named in the complaint of the filing of the complaint.
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> (2)(A) Within sixty days of receipt of a complaint filed under paragraph (1) of this subsection, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify the complainant and the person alleged to have committed a violation of this section of his findings. Where the Secretary of Labor has concluded that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed by subparagraph (B) of this paragraph. Thereafter, either the person alleged to have committed the violation or the complainant may, within thirty days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be expeditiously conducted. Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review. Upon the conclusion of such hearing, the Secretary of Labor shall issue a final order within one hundred and twenty days. In the interim, such proceedings may be terminated at any time on the basis of a settle-

ment agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) If, in response to a complaint filed under paragraph (1) of this subsection, the Secretary of Labor determines that a violation of subsection (a) or (b) of this section has occurred, the Secretary of Labor shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, and (iii) compensatory damages. If such an order is issued, the Secretary of Labor, at the request of the complainant may assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

STATEMENT

1. Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. (& Supp. II) 2305, prohibits employers in the motor transportation industry from taking retaliatory action against employees who assert their rights to safe working conditions. The statute provides that "[n]o person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee filed a complaint or otherwise instituted a proceeding "relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order," or because the employee refused for safety reasons to operate a commercial motor vehicle. 49 U.S.C. App. 2305(a) and (b).[1]

An employee who "believes he has been discharged, disciplined, or otherwise discriminated against by any person" in violation of these statutory protections may file a complaint with the Secretary of Labor (49 U.S.C. App. 2305(c)(1)).[2] Upon receipt of a complaint, the Secretary is required to "notify the person named in the complaint of the filing of the complaint" (*ibid.*). The Secretary must then investigate the complaint in order to "determine whether there is reasonable cause to believe that the complaint has merit" (49 U.S.C. App. 2305(c)(2)(A)).[3] If the Secretary

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[1] The statute defines a "commercial motor vehicle" as a vehicle used "principally to transport passengers or cargo" that has a weight rating of ten thousand or more pounds, is designed to transport more than ten persons, or is used to transport hazardous materials. 49 U.S.C. App. 2301(1).

[2] The Secretary has delegated his authority under Section 405 to the Assistant Secretary for Occupational Safety and Health, who, in turn, has delegated this authority to the Regional Administrators of the Occupational Safety and Health Administration.

[3] The Secretary has adopted detailed written procedures governing the investigation of complaints filed by employees under Section 405. The current version of these procedures requires the Labor Department investigator to interview the complainant and encourage the complainant to identify witnesses who can support his allegations. The investigator must also "contact the [employer], notify the [employer] of the substance of the complaint and arrange to meet with the [employer] or its counsel to interview the appropriate witnesses." OSHA Instruction DIS.4A, at V5 (Aug. 26, 1985). The written procedures emphasize that the investigator should

concludes as a result of the investigation that there is "reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order" providing for (1) abatement of the retaliatory conduct, (2) reinstatement of the employee to his or her former position, and (3) back pay and any other compensatory damages (*ibid.*).

The employee or the employer may file objections to the Secretary's findings and request a "hearing on the record," which "shall be expeditiously conducted" (49 U.S.C. App. 2305(c)(2)(A)). The statute specifically provides that the filing by the employer of objections to the Secretary's findings and a request for a hearing "shall not operate to stay any reinstatement remedy contained in the preliminary order" (*ibid.*). The hearing is held before an administrative law judge (ALJ), who issues a recommended decision that is reviewed by the Secretary. The Secretary must issue a final order within 120 days of the conclusion of the hearing (49 U.S.C. App. 2305(c)(2)(A)).[4] The order is subject to judicial review in the

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obtain evidence corroborating the complainant's allegations, secure the employer's response to the allegations, and attempt to corroborate the employer's response (*id.* at V5-V7). The procedures in effect at the time of the events in this case similarly required the investigator to consult with the employer. OSHA Instruction CPL 2.45A CH-4, at X5 (Mar. 8, 1984); OSHA Instruction DIS.6, at 4, 8-9 (Dec. 12, 1983); OSHA Investigation Manual at V1, V13-V14 (1979). We have lodged copies of these written procedures with the Clerk of this Court and served a copy of the procedures upon counsel for appellee.

[4] The Secretary has interpreted the statute to require the issuance of a final order within 120 days after the ALJ's issuance of his recommended decision.

appropriate court of appeals (49 U.S.C. App. 2305(d)(1)).[5]

2. Appellee, "one of the nation's largest over-the-road carriers" (J.A. 80), is engaged in the business of operating commercial motor vehicles interstate, principally to transport cargo (J.S. App. 1a, 20a). Appellee is therefore subject to the requirements of Section 405. 49 U.S.C. App. 2301(3); J.S. App. 1a, 20a; J.A. 90.

On November 22, 1983, appellee discharged one of its truck drivers, Jerry Hufstetler, allegedly because Hufstetler had committed an act of dishonesty: appellee asserted that Hufstetler had intentionally disabled several of the lights on his truck, creating a false breakdown in order to obtain extra pay. On November 27, 1983, Hufstetler filed a grievance under the National Master Freight Agreement, a collective bargaining agreement between appellee and Teamsters Local Union No. 528, claiming that he had been fired in retaliation for his repeated safety-related requests for repairs to his truck. The grievance proceeded to arbitration in accordance with the agreement. The first arbitration panel was unable to reach a decision on the grievance; the second arbitration panel rejected Hufstetler's claim on January 30, 1984. J.S. App. 1a-2a, 21a; J.A. 40-76, 91-92.

Hufstetler filed a complaint with the Secretary of Labor on February 7, 1984, alleging that he had been discharged in violation of Section 405 of the Surface Transportation Assistance Act because he was discharged in retaliation for his requests for safety

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[5] If neither the employer nor the employee requests a hearing, "the preliminary order [is] deemed a final order which is not subject to judicial review" (49 U.S.C. App. 2305(c)(2)(A)).

repairs. The Secretary notified appellee of Hufstetler's complaint and began an investigation of Hufstetler's allegations. J.S. App. 2a, 21a. In the course of the investigation, appellee was afforded "the opportunity to fully state and support [its] positions" (J.A. 79). Appellee submitted a "written position statement with supporting affidavits explaining the circumstances of [the] discharge" together with a copy of the arbitration decision. J.A. 93; see also *id.* at 6. Appellee's attorney subsequently submitted a letter setting forth appellee's legal arguments and presented appellee's views orally at a meeting with Labor Department officials (J.A. 6-7, 93).

The Secretary's 11-month investigation found "credible, independent evidence" supporting Hufstetler's allegations (J.A. 79). On January 21, 1985, the Secretary concluded that there was reasonable cause to believe that appellee had discharged Hufstetler in violation of Section 405 and issued a preliminary order directing appellee to reinstate Hufstetler (J.S. App. 3a, 20a-23a). The Secretary found that "[Hufstetler] had a two year history of bringing vehicle safety problems to the attention of [appellee] and had complained to [the Department of Transportation] and to elected public officials. These complaints constitute protected activity under the [Surface Transportation Assistance] Act" (*id.* at 22a). The Secretary further found that "[appellee] had warned [Hufstetler] and threatened to get him due to his excessive breakdowns due to [Hufstetler's] recognition of safety violations" and that "[appellee] had threatened to do anything [it] could to catch [Hufstetler] doing something wrong, to get rid of him" (*id.* at 21a, 22a).

With respect to appellee's allegation that Hufstetler had been dishonest, the Secretary determined

that "[appellee's] evidence to support the discharge is conjecture. [Hufstetler] has presented evidence to support his innocence" (J.S. App. 21a). Based on these facts, the Secretary concluded that "[appellee's] termination of [Hufstetler's] employment was discriminatorily motivated by [Hufstetler's] protected activity" (*id.* at 22a), and he ordered appellee "to immediately offer reinstatement to [Hufstetler]," to compensate Hufstetler with back pay, and "to expunge from [Hufstetler's] personnel records any adverse references to his discharge or any protected activity" (*id.* at 23a).

3. On February 1, 1985—11 days after the Secretary's issuance of the preliminary order—appellee commenced this action in the United States District Court for the Northern District of Georgia, seeking an injunction against the enforcement of the Secretary's order and a declaratory judgment that the Secretary's order was unconstitutional. Appellee claimed that the issuance of the reinstatement order without a prior "evidentiary hearing" violated its due process rights (J.A. 9-10). The district court issued a preliminary injunction barring enforcement of the Secretary's reinstatement order (J.S. App. 11a-19a).[6]

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[6] Appellee also filed objections to the Secretary's findings and a request for an on-the-record hearing pursuant to 49 U.S.C. App. 2305(c)(2)(A). The hearing was held before an administrative law judge on March 26-29, 1985, and the ALJ issued his recommended decision and order on October 30, 1985 (J.S. App. 29a-43a). The ALJ observed that Hufstetler had filed numerous safety-related complaints (*id.* at 32a-35a, 39a-41a) and found that "[t]he record is replete with many statements by [appellee's] supervisors demonstrating their animus toward [Hufstetler] as a result [of] his engaging in protected activities. The issuance of warning letters to [Hufstetler], while other employees were not repri-

On November 18, 1985, the district court issued an order granting appellee's motion for summary judgment (J.A. App. 1a-10a). The court declared Section 405(c)(2)(A) "unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing" (J.S. App. 9a). Accordingly, the court entered a permanent injunction "restrain[ing] and enjoin[ing] [appellants] from further issuance of preliminary orders of reinstatement * * * without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process" (*ibid.*).[7]

The district court observed that in order to ascertain the requirements of due process it is necessary to consider "the private interest affected by the government's action; the risk of an erroneous deprivation of such interest through the procedures used; and, the government's interest, including the function involved and the administrative and fiscal burdens that the additional procedural requirement would entail" (J.S. App. 6a). The court found that

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manded for similar acts, and the acrimonious statements cause the conclusion that the discharge had a retaliatory motive" (*id.* at 41a). The ALJ further found that the evidence did not indicate that Hufstetler was discharged for a reason other than his safety-related activities (*id.* at 41a-42a). The ALJ's recommended decision is pending before the Secretary; appellee has raised a number of objections to the ALJ's recommended decision. See Mot. to Aff. 5-6 n.4, A1-A9.

[7] The district court also held that appellee was not required to exhaust its administrative remedies (J.S. App. 4a-5a), that the controversy between the parties was not moot (*id.* at 5a), and that the district court did not lack jurisdiction over appellee's claim (*ibid.*). We have not sought review of these determinations.

appellee had "important interests in not being compelled to reinstate an employee discharged for wrongful conduct and in upholding the arbitration provisions of its bargaining agreement" (*ibid.*).

The court further found that "the procedures used by [the Department of Labor] were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility. An evidentiary hearing, prior to mandatory reinstatement, would clearly strengthen the reliability of the procedures and the ultimate decision, and hedge against the risk of erroneous deprivation" (J.S. App. 8a (citation omitted)). The court also noted that the Secretary "failed to make available the names and statements of witnesses upon which [the] decision was based" (*id.* at 7a).

With respect to the government's interest, the court concluded that "[a]lthough the governmental interests in promoting safety on the highways and prohibiting retaliatory discharge are indeed valid, [the Department of Labor] has failed to show any compelling considerations which necessitate postponing the hearing" (J.A. App. 8a). It found that "the administrative or fiscal burdens attendant to such a hearing prior to reinstatement would be negligible" because the statute already provides for a post-reinstatement hearing (*ibid.*).

Weighing these considerations, the court found that the temporary reinstatement procedures set forth in the statute failed to provide employers with a "meaningful opportunity to be heard" (J.S. App. 9a). The court concluded that the requirements of due process could be satisfied only through a prereinstatement "evidentiary hearing" at which the employer is afforded "at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses" (*id.* at 8a-9a).

SUMMARY OF ARGUMENT

This case concerns a challenge under the Due Process Clause of the Fifth Amendment to an essential element of a statute enacted by Congress to maintain and improve highway safety. Congress concluded that its safety program should encourage motor carrier employees to report violations of federal highway safety standards. It therefore enacted Section 405 of the Surface Transportation Assistance Act of 1982, which expressly prohibits discharge, discipline, or discrimination in retaliation for an employee's safety-related activities. In order to alleviate employees' fears of interim losses of jobs on account of safety complaints, the statute further provides that an employee who alleges that he was discharged in violation of Section 405 must be reinstated on a temporary basis, without a prior evidentiary hearing, if the Secretary finds reasonable cause to believe that the discharge was in fact retaliatory.

Before issuing such a temporary reinstatement order, the Secretary affords the employer notice and an opportunity to present evidence and state his views. In addition, Section 405 provides for a prompt post-reinstatement evidentiary hearing regarding the legality of the discharge. Despite these procedural protections, however, the district court held that Section 405 violates the Due Process Clause. The court concluded that the Constitution prohibits the temporary reinstatement remedy created by Congress because an evidentiary hearing must be conducted *before* the issuance of a reinstatement order. That determination not only ignores settled principles of deference to legislative determinations in assessing the constitutionality of an Act of Congress, it also reflects a fundamental misunderstanding of this

Court's decisions interpreting the Due Process Clause and of Congress's objectives in enacting Section 405.

This Court has considered in a variety of contexts the question whether the Due Process Clause requires that an evidentiary hearing be held prior to a temporary deprivation of property when a full post-deprivation hearing is provided under the relevant statutory scheme. The "ordinary principle" established by this Court's decisions is that due process is satisfied by "something less than an evidentiary hearing * * * prior to adverse administrative action" (*Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976)). In only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), has the Court required a full adversarial hearing before an initial deprivation of property, and the "crucial factor" in that case was that an erroneous decision would deprive an eligible welfare recipient of "the means to obtain essential food, clothing, housing, and medical care" (397 U.S. at 264 (footnote omitted)). An employer plainly would not suffer such drastic adverse consequences as a result of the issuance of a temporary reinstatement order; and, although the court below ignored this interest, the employee would suffer serious consequences if he is discharged for a lengthy period for a reason ultimately found to be unlawful. Under these circumstances, due process requires at most that the employer be provided with notice and an informal opportunity to respond prior to the issuance of the temporary order.

An assessment of the specific interests relevant to the due process inquiry confirms this conclusion. The employer's private interest is relatively insubstantial because an employer required to pay the wages of a reinstated employee receives the benefits of the em-

ployee's labor. Although the employer does suffer some reduction in his control over his workforce by virtue of the temporary nullification of his decision to discharge one of his employees, the significance of this consideration is reduced by the fact that the employer's control of the workforce already is limited by statute and employment contracts. Thus, the interest of the employer affected by the temporary order simply is not substantial.

On the other hand, the governmental interest implicated by the temporary reinstatement order is quite weighty. The order furthers the government's interest in promoting public safety by encouraging motor carrier employees to engage in safety-related conduct. The court below failed to recognize that the threat of a lengthy temporary discharge could be a substantial deterrent to safety complaints. But the increased delay in obtaining reinstatement for wrongfully discharged employees that would result from the elimination of the temporary reinstatement remedy undoubtedly would reduce employees' willingness to engage in safety-related activity. Requiring the Secretary to afford employers an evidentiary hearing before issuing a reinstatement order thus would reduce the effectiveness of Congress's safety program.

Finally, the procedures utilized by the Secretary of Labor in determining whether to issue a temporary reinstatement order under Section 405 significantly reduce the risk of erroneous determinations. The notice and opportunity to respond provided to employers—together with the requirement that the Secretary find "reasonable cause to believe" that the discharge was unlawful (49 U.S.C. App. 2305(c)(2)(A))—serve as the "initial check against mistaken decisions" generally required by this Court in connection

with temporary deprivations of property (*Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 12).

The district court erroneously concluded that an evidentiary hearing is always required to resolve disputed issues of fact in the temporary deprivation context. Even where factual disputes are involved, this Court has rarely concluded that the risk of an erroneous decision is so great as to require the government to stay its hand pending an evidentiary hearing. Notice and an opportunity to respond are all that is necessary to provide a sufficient check against erroneous decisionmaking. Since the procedures followed by the Secretary under Section 405 plainly satisfy that standard, the temporary reinstatement remedy should be upheld.

ARGUMENT

THE TEMPORARY REINSTATEMENT REMEDY SET FORTH IN SECTION 405(c) DOES NOT VIOLATE THE DUE PROCESS CLAUSE

The guarantee of procedural due process contained in the Fifth Amendment requires the government to treat an individual with fundamental fairness when it deprives him of his liberty or his property. *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 14; *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24-25 (1981). Like "fundamental fairness" itself, a term "whose meaning can be as opaque as its importance is lofty" (*Lassiter*, 452 U.S. at 24), procedural due process is "not a technical conception with a fixed content unrelated to time, place and circumstances" (*Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961)). Rather, due process is a "flexible concept," with the procedural requirements

mandated by the Constitution depending upon the specific circumstances of the particular deprivation of liberty or property. *Walters* v. *National Association of Radiation Survivors*, slip op. 14; see also *Lassiter*, 452 U.S. at 24, 31; *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976).

This constitutional guarantee does not, of course, apply to every situation in which an individual is affected adversely by government action. The threshold question in assessing any claim that the government has failed to provide the requisites of procedural due process is whether the challenged government action deprived the claimant of a liberty or property interest that is protected by the Due Process Clause. *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 4-5; *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972).

Appellee had a contractual right to discharge its employees for cause.[8] Although the power of Congress to regulate in this area is very broad, we do not dispute that appellee's right to discharge constitutes a property interest protected by the Due Process Clause and that the Secretary's order—had it gone into effect—would have deprived appellee of this interest by requiring the reinstatement of an employee previously discharged by appellee.[9]

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[8] The contract between appellee and its employees indicates that appellee generally is free to terminate an employee for just cause so long as the employee has received at least one warning notice. Discharges for dishonesty and certain other infractions need not be preceded by a warning. J.A. 37-39.

[9] We also note, as the court below failed to do, that there is a competing private interest—that of the employee in not being wrongfully discharged (see pages 33-38, *infra*).

"Once it is determined that due process applies, the question remains what process is due" (*Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333, quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); see also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). As we have discussed (see pages 5-6), Section 405 provides employers such as appellee with several opportunities to be heard in connection with the assessment of the legality of a discharge. In the course of the investigation of an employee's complaint, the employer is given an opportunity to respond to the employee's charges and present witnesses and documentary evidence in support of its position. If the Secretary of Labor finds reasonable cause to believe that the discharge violated the statute, the employer may request a "hearing on the record," which "shall be expeditiously conducted" (49 U.S.C. App. 2305(c)(2)(A)).[10] Appellee contends that these procedures are inadequate under the Constitution, however, because an evidentiary hearing should be conducted *before* an employer may be required to reinstate a previously discharged employee, even when the reinstatement is on a temporary basis subject to the outcome of a later evidentiary hearing. Thus, the sole question before the Court in this case is

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[10] The provisions of the Administrative Procedure Act governing adjudications apply to the conduct of such hearings. 5 U.S.C. 554(a) (providing that such requirements apply "in every case of an adjudication required by statute to be determined on the record after opportunity for an agency hearing"). Thus, an employer is entitled to an independent hearing examiner, use of oral and documentary evidence, cross-examination of adverse witnesses, and other trial-type procedures (5 U.S.C. 556, 557).

whether Congress's remedy of temporary reinstatement prior to the evidentiary hearing comports with the requirements of the Due Process Clause in the present circumstances.

The Court long has recognized that "[j]udging the constitutionality of an Act of Congress is properly considered ' " the gravest and most delicate duty that this Court is called upon to perform." ' " *Walters*, slip op. 13, quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The starting point in undertaking this task is "the strong presumption in favor of the validity of congressional action" (*Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982)), which rests on the fact that Congress's adoption of the statute constitutes the "duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters*, slip op. 13; see also *Rostker* v. *Goldberg*, 453 U.S. at 64.

Moreover, "[t]his deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment" (*Walters*, slip op. 14). In view of the flexible nature of the requirements of due process, courts should be particularly receptive to legislative efforts to tailor administrative procedures to a specific decisional context. As the Court has observed, "[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. * * * [T]he courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process * * *." *Landon* v. *Plasencia*,

459 U.S. 21, 34-35 (1982); see also *Walters*, slip op. 20.

The district court ignored these basic principles of constitutional adjudication and fundamentally misapplied this Court's decisions concerning the Due Process Clause in striking down the temporary reinstatement remedy set forth in Section 405(c). To discover the requisites of procedural due process, it is necessary to "first consider[] any relevant precedents and then * * * assess[] the several interests that are at stake" in the particular situation (*Lassiter* v. *Department of Social Services*, 452 U.S. at 25). This Court's decisions regarding temporary deprivations of property and an evaluation of the specific interests implicated in the present context establish beyond any doubt that Section 405(c) affords an employer all of the procedural protection required by the Constitution.

A. The Due Process Clause Almost Never Requires The Government To Hold An Evidentiary Hearing Before Effecting A Temporary Deprivation Of Property

This Court has considered in a variety of contexts the question whether the Due Process Clause requires that an evidentiary hearing be held prior to a temporary deprivation of property when a full post-deprivation hearing is provided under the relevant statutory scheme. The Court has consistently rejected claims that an evidentiary hearing, complete with an opportunity to confront and cross-examine witnesses, must be held before the government may temporarily deprive an individual of his property. The " 'ordinary principle' " established by the Court's decisions is that " 'something less than an evidentiary hearing is sufficient prior to adverse administrative action.' "

Mackey v. *Montrym*, 443 U.S. 1, 13 (1979) (citation omitted); see also *Loudermill*, slip op. 8-9, 12; *Mathews*, 424 U.S. at 343.

In *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), the Court upheld the constitutionality of a state statute authorizing the issuance of an ex parte sequestration order that deprived a property owner of the possession of personal property without any prior notice or opportunity for a hearing. The statute required the filing of an affidavit and bond by the party seeking the order and specified that the order could be issued only by a judge. In addition, the owner of the property was free to seek the dissolution of the order immediately after the seizure of the property.

The Court concluded that the statute "effect[ed] a constitutional accommodation of the conflicting interests of the parties" (416 U.S. at 607). The creditor was able to protect his security interest by obtaining control of the property, and the property owner was protected by the bond posted by the creditor and by the availability of post-sequestration judicial relief. The Court found that the statutory procedure established "an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits" (*id.* at 618).[11]

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[11] Ex parte proceedings also are permissible where "swift action is necessary to protect the public health and safety." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 301 (1981) (upholding the issuance of orders requiring the immediate closure of surface mining operations under the Surface Mining Control and Reclamation Act of 1977); see also *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599-602 (1950) (summary seizure under the Federal Food, Drug, and Cosmetic Act of misbranded goods is permissible where there is probable cause to believe that the misbranding is fraudulent or would result in injury or damage to the purchaser or user); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 313-321 (1908) (upholding the seizure and destruction of unwholesome food products under a municipal ordinance without any prior notice or hearing). Predeprivation notice and a hearing also are not required in other circumstances in which predeprivation procedures are not feasible. See *Hudson* v. *Palmer*, 468 U.S. 517 (1984); *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

In most other situations, the Court has upheld predeprivation procedures against constitutional challenge as long as the party to be affected by the government action is provided with notice of the case against him and "an informal opportunity to tell his side of the story." *Mackey* v. *Montrym*, 443 U.S. at 14; see also *Loudermill*, slip op. 12. This predeprivation hearing "need not definitively resolve the propriety of the [government action]. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges * * * are true and support the proposed action." *Loudermill*, slip op. 12; see also *Mackey* v. *Montrym*, 443 U.S. at 13; *Bell* v. *Burson*, 402 U.S. 535, 540 (1971). These limited procedural protections have been found to be sufficient to satisfy due process because the deprivation of property is temporary and "prompt postdeprivation review is available for correction of administrative error." *Mackey* v. *Montrym*, 443 U.S. at 13; see also *Loudermill*, slip op. 13-14.

For example, in *Barry* v. *Barchi*, 443 U.S. 55 (1979), the Court held that an evidentiary hearing was not required prior to the temporary suspension of a horse trainer suspected of complicity in the

drugging of a race horse. The Court stated that "the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging" (443 U.S. at 64). The Court held that the finding of the testing official that the horse was drugged, combined with a state law evidentiary presumption, was sufficient to establish probable cause. It noted that the trainer "was given more than one opportunity to present his side of the story to the State's investigators" (*id.* at 65), and concluded that these procedures "sufficed for the purposes of probable cause and interim suspension" (*id.* at 66).

The Court has reached the same conclusion in a variety of other factual settings, holding that notice and an opportunity to respond—not an evidentiary hearing—are all that the Constitution requires prior to a temporary deprivation of property. *Loudermill*, slip op. 9-12 (employee discharge); *Mackey* v. *Montrym*, 443 U.S. at 13-19 (suspension of driver's license); *Dixon* v. *Love*, 431 U.S. 105, 112-113 (1977) (same); *Mathews*, 424 U.S. at 332-349 (termination of disability benefits); *Goss* v. *Lopez*, 419 U.S. 565, 582-584 (1975) (suspension of student from school); *Arnett* v. *Kennedy*, 416 U.S. 134, 170 (1974) (opinion of Powell, J.) (employee discharge); *id.* at 196-202 (opinion of White, J.); see also *McClelland* v. *Massinga*, 786 F.2d 1205, 1210-1216 (4th Cir. 1986) (diversion of tax refund from taxpayer); *Signet Construction Corp.* v. *Borg*, 775 F.2d 486, 489-490 (2d Cir. 1985) (withholding contract payments); cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 119-126 (1975) (adversarial hearing not required before depriving an individual of his liberty prior to trial).[12]

The Court has departed from this settled rule "[i]n only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), [where] the Court required a full adversarial evidentiary hearing prior to adverse governmental action" (*Loudermill*, slip op. 12). The Court held in *Goldberg* that a recipient of welfare benefits must be afforded an evidentiary hearing prior to the termination of such benefits. The Court stated that "the crucial factor in this context—a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immedi-

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[12] Appellee argues (Mot. to Aff. 10-13) that the Court has concluded that these predeprivation procedures satisfy due process only where the administrative decision does "not turn on resolving disputed questions of fact, credibility, or veracity" (*id.* at 11). That assertion is incorrect. In *Loudermill*, for example, the Court observed that the propriety of the dismissal of the government employee "turned not on [an] objective fact * * *, but on the subjective question whether [the employee] had lied on his application form." Slip op. 10 n.9; see also *Barry*, 443 U.S. at 65-66 (evidentiary hearing not required despite factual dispute regarding trainer's negligence in connection with drugging of race horse); *Mackey* v. *Montrym*, 443 U.S. at 15 ("even when disputes as to the historical facts do arise, we are not persuaded that the risk of error inherent in the statute's initial reliance on the representations of the reporting officer is so substantial in itself as to require that the [government] stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence"); page 42, *infra*.

ately desperate" (397 U.S. at 264 (emphasis in original)).

The limited scope of the Court's decision in *Goldberg* was confirmed by its determination in *Mathews* v. *Eldridge*, *supra*, that a recipient of disability benefits is entitled only to notice and an informal opportunity to respond prior to the termination of his benefits. The Court found that an evidentiary hearing is not required because the hardship resulting from an erroneous deprivation of disability benefits, while "significant," is "likely to be less than that [imposed upon] a welfare recipient." 424 U.S. at 342; see also *Walters*, slip op. 27 ("dispositive" factor in *Goldberg* was that welfare recipients depended upon benefit payments "for their daily subsistence").

This Court's decisions make clear that the temporary reinstatement remedy at issue in this case does not violate the Constitution. *Goldberg* plainly is inapplicable because the consequences of the temporary restriction upon appellee's right to discharge one of its employees do not in any way resemble the hardship incurred by a welfare recipient who is deprived of his benefits. Appellee's property interest is instead sharply limited. See pages 26-30, *infra*.

The present case more closely resembles the situation in *Mitchell*: the employer and the discharged employee each possess interests in the "property" at issue—the discharged employee's job—and the question addressed by Section 405 is how to allocate the interim burden of a disputed discharge pending a final resolution of the legality of the discharge. The power of Congress to regulate the surface transportation industry with regard to matters affecting safety and conditions of employment is, of course, extremely broad. In view of the offsetting interest of employees

in that industry in not being temporarily discharged for what prove to be unlawful reasons under federal law, Congress could, we submit, have imposed any reasonable method of selecting who, as between employer and employee, will bear the interim burden while the legality of a discharge is determined. As we discuss below (see pages 47-49), Congress chose an eminently reasonable method of accommodating these interests when it enacted Section 405.

Finally, the prereinstatement procedures afforded under Section 405(c) are essentially identical to the process that the Court has found to be required in connection with temporary deprivations of more significant property interests. The employer is made aware of the charges against him and afforded an opportunity to present his side of the story regarding the discharge; the reinstatement order must be preceded by a finding of "reasonable cause" to believe that the employer violated the applicable statutory standard (49 U.S.C. App. 2305(c)(2)(A)); and the statute provides a prompt post-deprivation evidentiary hearing (49 U.S.C. App. 2305(c)(2)(B)). The statute therefore amply affords employers the procedural protection required by the Constitution prior to the issuance of a temporary reinstatement order. A fuller review of the interests implicated by a temporary reinstatement order confirms the correctness of this conclusion.

B. Consideration Of The Factors Identified By This Court in *Mathews* Clearly Demonstrates That The Temporary Reinstatement Remedy Satisfies The Requirements Of Procedural Due Process

The Court has made clear that "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the pri-

vate interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335; see also *Loudermill*, slip op. 9. An assessment of these factors makes clear that the procedures currently followed by the Secretary provide an employer with all the predeprivation process that could possibly be required in this setting.

1. ***Appellee's private interest***

The property interest affected by a temporary reinstatement order issued pursuant to Section 405(c) is the employer's right to discharge an employee for cause. By requiring the employer to reinstate a previously discharged employee, the order temporarily deprives the employer of this interest. It is clear, however, that the adverse consequences of this deprivation of property are extremely limited. The employer must pay the employee's salary pending a final determination of the legality of the discharge, but the employer, in turn, receives "the benefit of the employee's labors" (*Loudermill*, slip op. 11). The adverse effect of the deprivation of property is largely mitigated by the fact that the employer receives value in return for the funds he is required to expend.

The only adverse consequence actually suffered by an employer is a reduction in his control over his workforce: he is unable to discharge an employee who he alleges is unsatisfactory. The district court noted that " '[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.' " J.S. App. 7a, quoting *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693, 703 (6th Cir. 1985); see also *Arnett* v. *Kennedy*, 416 U.S. at 168 (opinion of Powell, J.).

A reinstatement order obviously does limit an employer's absolute authority over the workforce, but, in assessing the magnitude of this consequence, it is important to note that the employer's authority is already circumscribed in a variety of ways. First, of course, he has no legal right to discharge an employee for safety complaints; depending on the ultimate outcome of the proceeding, therefore, a reinstatement order is either a mere implementation of that undoubtedly valid prohibition or a temporary restriction while the necessary determination is made. Other federal statutes forbid an employer from basing employment decisions upon characteristics such as race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a)(1); see also 29 U.S.C. (& Supp. II) 623 (age discrimination). And appellee's contract with its employees limits its discharge authority in the same manner as the reinstatement order, requiring appellee to reinstate an employee when a discharge is successfully challenged under the contract's arbitration procedures (J.A. 37-39). Thus, the sole effect of the reinstatement order is to impose some additional restriction in an area in which appellee already has lost a considerable degree of control.[13]

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[13] Appellee suggests (Mot. to Aff. 8 n.6) that a reinstatement order would interfere with other "private property interests" because "it [would have] the effect of displacing employees junior to the complainant on the seniority roster and bumping an employee to lay-off status." Of course, a

The adverse consequences suffered by an employer such as appellee in this setting are much less significant than the adverse consequences resulting from virtually all of the temporary deprivations of property previously considered by this Court. The Court observed in *Goldberg* v. *Kelly*, *supra*, that the with-

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temporary reinstatement order does not require an employer to lay off an employee; any such layoff is a result of the employer's own choice and cannot be characterized as a necessary consequence of the reinstatement order, especially in a company the size of appellee. Moreover, an employee hired after the challenged discharge takes his position subject to being displaced as a result of the rehiring of his predecessor (J.A. 82). The reinstatement order accordingly does not disrupt his expectations.

Appellee also observes (Mot. to Aff. 8 n.6) that the reinstatement order "had the effect of upsetting an arbitration decision rendered under the collective bargaining agreement which had sustained the * * * discharge." But this is simply another way of stating that the order deprived appellee of its right to fire its employee; if the arbitration decision had overturned the discharge, appellee would have been required to reinstate its employee and the reinstatement order would have been unnecessary. The existence of the arbitration decision thus adds nothing to the analysis. Moreover, the arbitration decision rejecting the employee's claim clearly did not bar the Secretary from considering the complaint challenging the discharge. See *McDonald* v. *City of West Branch*, 466 U.S. 284 (1984) (arbitration decision finding that discharge was supported by just cause does not bar employee from challenging discharge under 42 U.S.C. 1983); *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 745-746 (1981) (unfavorable arbitration decision does not bar subsequent suit based on the same facts alleging violation of Fair Labor Standards Act); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (adverse arbitration decision does not bar employee from challenging discharge under Title VII of the Civil Rights Act of 1964, and federal court need not defer to arbitrator's decision).

drawal of welfare benefits threatens recipients with the deprivation "of the very means by which to live" (397 U.S. at 264). The discharge of a government employee similarly could "depriv[e] [the employee] of the means of livelihood" (*Loudermill*, slip op. 9). Other decisions have involved a license necessary to pursue one's livelihood (*Barry* v. *Barchi*, *supra*) and a drivers' license, the suspension of which could cause "personal inconvenience and economic hardship" (*Mackey* v. *Montrym*, 443 U.S. at 11). Each of these government actions thus threatens the individual subjected to the temporary deprivation of property with immediate hardship. See Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1295-1304 (1975) (discussing severity of government action). In terms of hardship, the adverse consequences to an *employee* of a wrongful temporary loss of his job come closer to the Court's past cases than do the consequences to the *employer* of a wrongful temporary reinstatement.

An incremental reduction in the employer's control of his workforce, which involves one employee out of many and may not result in any adverse economic consequences, cannot be equated with these situations. The deprivation of property at issue here simply does not have the significant, life-altering adverse consequences that the Court has cited in concluding that due process requires specific procedural protections in connection with temporary deprivations of property. The present case instead resembles the consequences of the sequestration order at issue in *Mitchell*, where the property owner lost only the control of his property, and was protected to a large degree against economic loss. See page 20, *supra*. In view of the quite minor adverse consequences visited upon an employer as a result of the temporary deprivation of his prop-

erty interest, a relatively small amount of procedural protection should be sufficient to satisfy due process.[14] Of course, as we discuss below, even if these consequences are regarded as the equivalent of the consequences of a deprivation of these other sorts of property interests, the process provided by Section 405 is sufficient to satisfy the Constitution.

2. ***The government's interest***

In sharp contrast to the relatively minor nature of the employer's private interest affected by Section 405(c), the governmental interests furthered by the temporary reinstatement remedy are extremely weighty. This Court has observed several times that government has a "paramount" interest in "preserv-

[14] Appellee argues (Mot. to Aff. 15) that "[t]he period of time that an employer would be required to have a reinstated individual on its payroll is a factor to be considered in measuring the weight of the private property interest." As we have discussed (see page 6), the statute imposes limitations upon the amount of time that the temporary order would remain in effect; these time limits comport with those that the Court previously has found permissible. See *Loudermill*, slip op. 13 (nine months); *Mathews*, 424 U.S. at 342 (10-11 months). The particular delay in this case is irrelevant because the "very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" *Walters*, slip op. 15, quoting *Mathews*, 424 U.S. at 344; see also *Parham* v. *J.R.*, 442 U.S. 584, 612-613 (1979). Appellee has not shown that the length of delay in this case is typical of Section 405(c) proceedings generally. See also page 49, *infra*. Finally, the length of time obviously also affects the burden on the employee, should his claim of unlawful discharge be vindicated.

ing the safety of its public highways." *Mackey* v. *Montrym*, 443 U.S. at 17; see also *Dixon* v. *Love*, 431 U.S. at 114. The legislative history of the safety provisions of the Surface Transportation Assistance Act of 1982, which include the employee protection provision at issue here, establishes that Congress enacted these provisions in order to promote highway safety and thereby curb the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (summary of safety provisions submitted by Sen. Danforth).[15]

Evidence before Congress revealed that "[t]ruck and bus accidents play[ed] a major role in th[e] unacceptable" increase in deaths and injuries on the nation's highways (S. Rep. 96-547, 96th Cong., 1st Sess. 3 (1979)). For example, the Department of Transportation reported a 42% increase in motor carrier accidents resulting in death or injury between 1975 and 1978, and pointed to a "disturbing trend"

[15] The safety provisions contained in the 1982 statute are virtually identical to provisions contained in a bill that was passed by the Senate in 1980, but died in the House of Representatives. See S. 1390, 96th Cong. 2d Sess. (1980). The legislative history of the 1982 statute makes clear that the 1980 bill—and a 1978 bill that was the predecessor of the 1980 bill—were the sources of the 1982 provisions. See 128 Cong. Rec. S15609 (daily ed. Dec. 19, 1982) (remarks of Sen. Danforth); *id.* at S14018-S14019 (daily ed. Dec. 7, 1982); see also *Highway Revenue Act of 1982: Hearing on S. 3044 Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 45 (1982) (statement of R.V. Durham) (suggesting incorporation of provisions of S. 1390 into the 1982 bill). The legislative histories of these earlier measures therefore are relevant in analyzing Congress's purpose in enacting the 1982 statute.

showing that truck accidents were increasing at a rate faster than the increase in the number of miles traveled by such vehicles. *Truck Safety Act: Hearings on S. 1390 and S. 1400 Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 1, 71, 84-85 (1979) [hereinafter cited as *Truck Safety Act Hearings*]. In 1982, truck accidents resulted in over 2,800 deaths, 28,500 injuries, and $355 million in property damage (128 Cong. Rec. S15609 (daily ed. Dec. 19, 1982) (remarks of Sen. Danforth)).

Congress found that a major reason for this increase in the danger on the nation's highways was that "[f]ederal commercial motor vehicle safety rules [were] being flagrantly ignored" (S. Rep. 96-547, *supra*, at 3). During a random spot check of commercial trucks by the Department of Transportation, 44% of all vehicles inspected were ordered out of service because they were found to have serious safety violations. *Truck Safety Act Hearings* 71 (statement of John S. Hassell, Deputy Administrator, Federal Highway Administration). Large percentages of safety violations also were detected in the course of other inspection efforts. *Id.* at 56, 67 (statement of Sen. Percy); *id.* at 82 (statement of John S. Hassell).[16] Congress concluded that "[t]his pattern of

[16] In hearings on the 1978 truck safety bill, Senator Cannon, the chairman of the Senate Commerce Committee, noted that "one-third of the 54,800 trucks and buses inspected by Federal personnel during 1974 and 1975 were unsafe and taken off the road until repaired." *Truck Safety Act of 1978: Hearing on S. 2970 Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. 1 (1978) (statement of Sen. Cannon); see also *id.* at 2 (54% of vehicles stopped on the basis of visual inspection were ordered out of service

noncompliance with commercial motor vehicle safety requirements demonstrates that federal enforcement efforts have proven ineffective, and this pattern will continue as long as these violations are likely to go undetected" (S. Rep. 96-547, *supra*, at 4). It decided to adopt "a systematic and integrated approach to remedying the present regulatory deficiencies in the commercial motor vehicle safety area." *Ibid.*; see also 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (remarks of Sen. Danforth).

One important element of this new motor vehicle safety program was the employee protection provision at issue in this case. Congress recognized that "employees and others in the commercial motor vehicle safety area are often in the best position to provide early detection of safety and health violations. Therefore, the legislation's complaint investigation and 'whistle-blower' protection provisions are directed to providing significant assistance to federal enforcement activities." S. Rep. 96-547, *supra*, at 4; see also *id.* at 17; 128 Cong. Rec. S14648 (daily ed. Dec. 14, 1982) (section-by-section analysis submitted by Sen. Baker) (stating in relation to the employee protection provision that "[e]nforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies, and the Department of Transportation").

Senator Percy, the original author of the employee protection provision, explained that employees must be insulated against economic retaliation if they are

until violations were corrected because "in the judgment of the inspectors [the violations] were likely to cause accidents"); *id.* at 28-33 (summary of results of Department of Transportation roadside safey inspection).

to assist in the enforcement of safety standards: "Because truck drivers are threatened with firing for cooperating with enforcement agencies, or for refusing to drive hazardous or overloaded vehicles, they have little choice other than to comply with their employer's instructions to violate the law. But, with the 'whistle-blower' protection of this legislation, drivers will be given the protection to refuse to violate the law." 128 Cong. Rec. S15769 (daily ed. Dec. 20, 1982); see also 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (summary of safety provisions submitted by Sen. Danforth) (the anti-retaliation provision "underscore[s] the strong Congressional policy that persons reporting health and safety violations should not suffer because of this action").

This Court has affirmed in other contexts the judgment made by Congress here—that a program dependent upon the participation of employees to secure compliance with regulatory standards will be successful only if employees are protected against economic retaliation. In *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), for example, the Court considered the employee protection provisions of the Fair Labor Standards Act. Observing that Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied," the Court concluded that "[p]lainly, effective enforcement could * * * only be expected if employees felt free to approach officials with their grievances" (361 U.S. at 292). Since "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions," the statute's "proscription of retaliatory acts" served to "foster a climate in which compliance with the substantive provisions of the Act would be enhanced."

Ibid.; see also *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972) (citation omitted) (anti-retaliation provision of the National Labor Relations Act necessary " 'to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses' "); *Donovan* v. *Square D Co.*, 709 F.2d 335, 338 (5th Cir. 1983) (Occupational Safety and Health Act); *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F.2d 772, 778-783 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975) (Federal Coal Mine Health and Safety Act).[17]

Section 405 similarly encourages employees to report statutory violations and cooperate in agency investigative efforts by eliminating the possibility of employer retaliation. The provision thus plays an important role in furthering the compelling governmental interest in highway safety.

The district court acknowledged that "the governmental interests in promoting safety on the highways and prohibiting retaliatory discharge are indeed valid," but concluded that these interests "would not be impaired by requiring a hearing prior to reinstatement" (J.S. App. 8a). This determination reflects a serious misunderstanding of the purpose of the temporary reinstatement remedy designed by Congress.

As a threshold matter, the district court erred by dismissing out of hand Congress's determination—reflected in the terms of the statute—that a tempo-

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[17] The fact that the reinstatement remedy " 'operate[s] to confer an incidental benefit on private persons does not detract from [its] public purpose' " (*Donovan* v. *Square D Co.*, 709 F.2d at 338 (citation omitted)). Rather, "[w]hile remedial, th[e] provision operates primarily toward furthering the public statutory goals" (*ibid.*).

rary reinstatement remedy is necessary to further the legislative purpose underlying the statute. Absent evidentiary support for its contrary determination, the district court was not free to ignore Congress's judgment that this remedy plays an important part in furthering the statutory goal by encouraging employees to come forward with safety complaints. Cf. *Walters* v. *National Association of Radiation Survivors*, slip op. 17.

Moreover, the court wholly failed to appreciate the importance of temporary reinstatement of an employee who, there is reasonable cause to believe, has been wrongfully discharged for safety complaints. The purpose of Section 405 is to provide employees with as much protection as possible from retaliation by employers so that employees will feel free to report safety violations. An employee is likely to view the speed with which he will be reinstated to his previous position as an important element of this protection. As one truck driver stated in House committee hearings on the subject of motor carrier safety, "[t]he promise of back pay years down the road just is not enough protection when your car has been repossessed, your mortgage foreclosed, and your marriage broken up in the meantime." *Commercial Motor Carrier Safety: Hearing Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong., 2d Sess. 35 (1980) (statement of Mel Packer); see also *Truck Safety Act Hearings* 160-161.

The Court "frequently [has] recognized the severity of depriving a person of the means of livelihood" (*Loudermill*, slip op. 9). The longer the discharged employee remains unemployed, the more devastating the financial consequences are likely to be. And even

if the discharged employee finds employment elsewhere, he may be forced to accept a reduced salary because he "is likely to be burdened by the questionable circumstances under which he left his previous job" (*ibid.*). Since the length of the delay prior to reinstatement thus affects the employee's ability to support himself and his family, it is likely to be the most significant factor considered by an employee deciding whether to exercise the rights protected by Section 405.

Congress plainly was concerned about the speed of the remedial process under Section 405. Its decision to authorize the Secretary of Labor to consider employees' complaints instead of permitting employees to commence lawsuits against their employers rested upon the determination that "[r]edress through the court system is a very expensive and time-consuming process." 128 Cong. Rec. S14648 (daily ed. Dec. 14, 1982) (section-by-section analysis submitted by Sen. Baker); see also S. Rep. 96-547, *supra*, at 6 (discussing necessity for "rapid action" by Department of Labor). Congress obviously determined that an expeditious, temporary remedy also was necessary to fulfill the provision's purpose of encouraging employees to come forward with safety-related information.

Requiring the Secretary to afford the employer an evidentiary hearing before ordering the temporary reinstatement of a discharged employee would thwart the accomplishment of Congress's purpose by delaying relief for employees who engage in safety-related activity. Indeed, the employer would be able to make use of the hearing and any possible appeal to delay the reinstatement of the employee. Cf. *Mathews*, 424 U.S. at 347 ("the fact that full benefits would con-

tinue until after such hearings would assure the exhaustion in most cases of this attractive option"). Mandating a prereinstatement evidentiary hearing thus would enable employers to continue to retaliate against an employee by prolonging the employee's unemployment. Such a vivid demonstration of the limited nature of the statutory protection undoubtedly would discourage other employees from engaging in safety-related actions, chilling the very conduct that Congress sought to promote when it enacted Section 405. The full force of the government's compelling interest in highway safety is therefore implicated by the temporary reinstatement remedy set forth in that provision.

The district court also ignored the fact that requiring a prereinstatement evidentiary hearing would impose additional fiscal and administrative burdens upon the government. See *Walters*, slip op. 15 & n.9. As we have discussed, employers undoubtedly would request prereinstatement evidentiary hearings in virtually every case, and "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews*, 424 U.S. at 347; see also *Dixon* v. *Love*, 431 U.S. at 114. Accordingly, the government interest in conserving public funds is also relevant in determining the process that is due in this context.

3. The risk of erroneous deprivation

An assessment of the risk that an employer will be erroneously deprived of his property interest requires consideration of two separate factors. First, it is necessary to evaluate the procedures followed by the Secretary prior to the issuance of a temporary reinstatement order to ascertain the effectiveness of those

procedures in limiting the risk of an erroneous determination. Second, the value of the additional procedures proposed by appellee and the district court must be considered. Of course, "the [Due Process] Clause does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error.'" *Walters*, slip op. 14-15, quoting *Mackey* v. *Montrym*, 443 U.S. at 13. "[W]hen prompt postdeprivation review is available for correction of administrative error, [the Court has] generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be" (*Mackey*, 443 U.S. at 13). This standard is satisfied by the procedure utilized by the Secretary in the present context.

The risk that the Secretary will erroneously issue a temporary reinstatement order is reduced significantly by the procedures that precede the issuance of such an order.[18] As soon as a complaint is re-

[18] Appellee refers several times to an "ex parte decision-making process" (Mot. to Aff. 8, 14), even though the Secretary's written procedures require that an employer be given notice of the charges against it and an opportunity to present its views. Appellee may be arguing that only the provisions of the statute—and not the procedures utilized by the Secretary in deciding whether to issue the temporary reinstatement order—may be considered in evaluating the constitutionality of the process afforded under Section 405. That position is plainly incorrect. In *Barry* v. *Barchi*, *supra*, for example, the Court concluded that the requirements of due process were satisfied by the informal procedures utilized in issuing the interim suspension of the trainer, even though these procedures were not specified in the statute (443 U.S. at 60-61 n.8, 65-66).

ceived from an employer, an experienced investigator begins a thorough investigation to determine whether the allegations of the complaint are supported by independent evidence (J.A. 78-79). The employer is informed of the allegations of the complaint and of the substance of the case against him.[19] The employer is also afforded a full opportunity to state his position and provide documentary evidence and oral testimony in support of that position. *Ibid;* see also pages 5-6 note 3, *supra.* Finally, a temporary reinstatement order is issued only if the Secretary finds credible evidence establishing "reasonable cause to believe" that the discharge of the employee was retaliatory (49 U.S.C. App. 2305(c)(2)(A)).[20]

These procedures were followed in the present case (J.A. 79). First, appellee was notified of the allegations made by employee Hufstetler.[21] Second, Labor

[19] The Secretary's procedures specifically provide that the employer must be informed of the allegations of the complaint. OSHA Instruction DIS.4A, at V5 (Aug. 26, 1985). Although the procedures do not in terms require the Labor Department investigator to inform the employer of the substance of the evidence supporting the employee's allegations, that requirement is implicit in the investigator's obligation to obtain the employer's response to those allegations. The Department of Labor informs us that the practice followed by its investigators is to inform the employer of the substance of the evidence supporting the employee's allegations.

[20] The evidence is reviewed by several Labor Department officials before a temporary reinstatement order is issued. The investigator, the supervisory investigator, a representative of the Office of the Solicitor of Labor, and the Regional Administrator each consider the sufficiency of the evidence developed in the investigation. J.A. 93-94.

[21] The record does not indicate whether appellee was informed of the substance of the evidence supporting the allega-

Department investigators conducted a thorough 11-month investigation and found "credible, independent evidence" supporting Hufstetler's claim of retaliatory discharge (*ibid.*). Third, appellee submitted a written position statement explaining the circumstances of the discharge, which was supported by affidavits from witnesses favorable to appellee (J.A. 6, 79, 93). Fourth, appellee's attorney submitted a letter setting forth appellee's legal arguments and orally presented appellee's side of the story in a meeting with Labor Department officials (J.A. 6-7, 93). Finally, the Secretary's designee reviewed the evidence and determined that there was "reasonable cause to believe" that Hufstetler had been discharged in violation of Section 405 (J.S. App. 20a-23a). These procedures clearly provided the "initial check against mistaken decisions" required prior to a temporary deprivation of property. *Loudermill,* slip op. 12; see also pages 19-23, 39, *supra.*

The district court found that the Secretary's pre-reinstatement procedures did not sufficiently reduce the risk of an erroneous decision and concluded that an employer also must be provided with an eviden-

tions. Appellee's reference (Mot. to Aff. 4) to "secret evidence gathered during the investigation from unknown parties" rings somewhat hollow, however, in view of the fact that the prior arbitration proceeding enabled appellee to become familiar with all of the circumstances relevant to the propriety of the discharge. Indeed, a comparison between the relevant portion of the temporary reinstatement order (J.S. App. 21a-22a) and the record of the arbitration proceeding (J.A. 40-76) indicates that the factors that influenced the Secretary had been brought out during that proceeding. Appellee therefore cannot claim that it was denied due process because it was not informed of the evidence supporting Hufstetler's allegations.

tiary hearing and the right to confront and cross-examine witnesses prior to the issuance of a temporary reinstatement order (J.S. App. 7a-8a). Each of these determinations is incorrect.

The basis for the district court's requirement of a prereinstatement evidentiary hearing was its conclusion that the Secretary's procedures "were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility" (J.S. App. 8a). However, even where the propriety of a temporary deprivation of property turns upon a factual dispute, this Court's decisions do not require the government to stay its hand pending the conclusion of an evidentiary hearing. In *Loudermill*, for example, the Court found that notice and an opportunity to be heard satisfied due process even though dismissals of employees for cause "often involve factual disputes" and the propriety of the discharge at issue in that case turned upon a credibility determination—the "subjective question whether [the employee] had lied on his application form" (slip op. 9, 10 & n.9).

Similarly, in *Barry* v. *Barchi*, *supra*, the trainer's assertion that he was not negligent in connection with the drugging of the race horse raised an issue regarding both his own credibility and the reliability of the evidence against him, but the Court did not require an evidentiary hearing prior to the temporary license suspension (443 U.S. at 64-66). Thus, the Court has already concluded that a predeprivation evidentiary hearing is not always necessary "to resolve questions of credibility or conflicts in the evidence" (*Mackey* v. *Montrym*, 443 U.S. at 15).[22]

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[22] Appellee's argument to the contrary (Mot. to Aff. 10-13) is simply incorrect. The portion of Justice Brennan's concurring and dissenting opinion cited by appellee (*id.* at 13) in support of its assertion that *Loudermill* did not involve a factual dispute appears to conflict with the majority's view of the case. Moreover, appellee erroneously states that *Barry* involved a statute holding a trainer "to the standard of an 'insurer'" (Mot. to Aff. 12). In fact, the statute simply established an evidentiary presumption that the trainer was free to rebut (443 U.S. at 59 & n.6). Since the trainer's statement obviously was relevant in determining whether the presumption had been rebutted, the propriety of the government action turned in part upon the trainer's credibility.

The Court's conclusion in *Goldberg* v. *Kelly*, *supra*, that an evidentiary hearing is required prior to the termination of welfare benefits did rest in part upon the observation that "written submissions are a wholly unsatisfactory basis for decision" when "credibility and veracity are at issue" (397 U.S. at 269). But the Court did not rely solely upon that rationale in requiring an evidentiary hearing. It also found that written submissions "are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance," and that a welfare recipient could not present his position "secondhand through his caseworker" because "the caseworker usually gathers the facts upon which the charge of ineligibility rests" (*ibid.*).

The justifications that supported the *Goldberg* Court's determination simply do not apply in the present context. First, employers such as appellee do not in any way resemble welfare recipients who cannot "write effectively" or "obtain professional assistance." The present case demonstrates that appellee, which is one of the nation's largest trucking concerns

(J.A. 80), is able to obtain high caliber professional assistance in presenting its views.

Second, the Court's general observations regarding the disadvantages of written submissions in a case that involves credibility determinations are irrelevant here because appellee was not limited to submitting written evidence. The Secretary's written guidelines for the investigation of employee complaints direct Department of Labor investigators to ask the employer to identify favorable witnesses, who then may be interviewed by the investigator. The employer is also permitted to state its position for the investigator. OSHA Instruction DIS.4A, at V5-V6 (Aug. 26, 1985); see also pages 5-6 note 3, *supra*. Thus, the employer is not precluded from presenting oral testimony that is relevant to the legality of the discharge.

Third, in the present context, unlike the situation involving welfare recipients, there is no reason to require direct presentation of this oral evidence to the decisionmaker. The complaint under Section 405 is filed by the employee, not the Secretary of Labor. The Labor Department investigator is charged with gathering all relevant facts and acts essentially as the agent of the decisionmaker. Thus, unlike a welfare caseworker, who the Court in *Goldberg* indicated might be biased against the recipient because he had prepared the charge of ineligibility (397 U.S. at 269), the Labor Department investigator has no prior involvement suggesting any reason why he would not accurately convey to the decisionmaker the evidence presented by the employer's witnesses.[23]

[23] The Court in *Goldberg* also observed that "[i]n almost every setting where *important decisions* turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses" (397 U.S. at 269 (emphasis added)). The Court tied this procedural requirement to the magnitude of the interest at stake in the proceeding. As we have discussed (see pages 28-30), appellee's interest is considerably less significant than a welfare recipient's interest in continued benefits.

Finally, the Secretary's determination is, of course, only preliminary; an evidentiary hearing is held prior to a final decision regarding the legality of the discharge. Indeed, the ultimate factual issue in this case—ascertaining the reasons for the discharge of an employee—is identical to the ultimate issue in cases involving due process challenges to the termination of government employees. Since an evidentiary hearing is not necessary before making a preliminary determination in the latter context (see *Loudermill*, slip op. 12), it similarly should not be required to ensure the accuracy of a preliminary determination in the present setting.

The district court noted that the Secretary did not "make available [to appellee] the names and statements of witnesses upon which its decision was based" (J.S. App. 7a) and appellee appears to argue that the Secretary should be obligated to disclose this information prior to the issuance of the temporary reinstatement order, even if the evidentiary hearing is not held until after the issuance of the order (Mot. to Aff. 4, 11). However, there is no basis for the contention that appellee was entitled to this information in advance of the post-reinstatement evidentiary hearing.

At the outset, making this information available to the employer would contribute only marginally to the accuracy of the preliminary determination. Since the employer will be aware of the employee's charges and the substance of the evidence supporting the

charges, the only conceivable purpose that could be served by disclosure of the witnesses' statements and identities is to permit the employer more easily to discredit these witnesses. Deferring such challenges until the evidentiary hearing will not undercut the accuracy of the preliminary determination because, even at the preliminary stage, credibility challenges can be based upon the employer's rebuttal of the substance of the witness's testimony. See Friendly, *supra*, 123 U. Pa. L. Rev. at 1286 (suppression of the names of witnesses and curtailment of access to adverse evidence is permissible when "the decision is preliminary").

Moreover, disclosure of a witness's identity at this early stage of the proceeding presents a very real threat to the integrity of the complaint investigation process. Common sense suggests that the very retaliation and coercion that Congress sought to prevent in enacting Section 405 could be directed against employees who support a discharged employee's retaliation claim. In *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Court recognized this possibility in a related context. It held that witness statements in a pending unfair labor practice proceeding are exempt from disclosure under the Freedom of Information Act because of the risk that unions or employees "will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." 437 U.S. at 239; see also *Cuccaro* v. *Secretary of Labor*, 770 F.2d 355, 359-360 (3d Cir. 1985) (upholding nondisclosure of names of witnesses in OSHA investigation for similar reasons); *L & C Marine Transport, Ltd.* v. *United States*, 740 F.2d 919, 921-925 (11th Cir. 1984) (same); cf. *Wolff*

v. *McDonnell*, 418 U.S. 539, 567-569 (1974) (holding that confrontation and cross-examination of witnesses are not required in context of a prison disciplinary proceeding because of the "high risk of reprisal" and the danger that the witness "may refuse to testify or admit any knowledge of the situation in question").[24]

The employer will, of course, learn the identity of the witness in the pre-hearing exchange of witness lists or when the witness takes the stand at the post-reinstatement evidentiary hearing.[25] Maintaining the confidentiality of the witness's identity prevents the employer from taking coercive action designed to deter the witness from testifying at the hearing. Disclosure of this information, on the other hand, is not likely to have a measurable effect on the accuracy of the preliminary determination. For these reasons, disclosure of witnesses' statements and identities should not be required in the preliminary stage of the proceeding.

4. *Balance of the factors*

The foregoing discussion makes clear that Section 405 provides an employer with all the prereinstate-

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[24] The Court indicated in *Mathews* v. *Eldridge*, *supra*, that the "policy of allowing the disability recipient's representative full access to all information relied upon by the state agency" provided a "further safeguard against mistake" (424 U.S. at 345-346). However, the Court did not state that disclosure of all such information was a necessary element of due process. In *Loudermill*, for example, the Court stated only that the party to be deprived of a property interest must be afforded "an explanation of the [adverse] evidence" (slip op. 12).

[25] A copy of the witness's interview statement is supplied to the employer when the witness begins to testify.

ment process that is required by the Due Process Clause. The governmental interest furthered by the temporary reinstatement remedy is the compelling interest in promoting highway safety, which is no less weighty than the governmental interests implicated in this Court's previous cases. The private interest of the employer that is affected by the temporary order, on the other hand, is not very significant and is offset by the employee's interest in not being temporarily discharged for what may prove to be an improper reason. A balancing of the interests therefore indicates that only minimal procedural protections should be required prior to the issuance of a temporary reinstatement order. The procedures followed by the Secretary are plainly sufficient to satisfy this requirement. Indeed, it is settled that the government may terminate an employee's interest in continued employment after affording the employee notice and an opportunity to respond (*Loudermill*, slip op. 9-11); the same process therefore must be sufficient to protect the employer's less weighty interest in removing unsatisfactory employees.

At bottom, the question in this case is whether Congress acted reasonably in determining that an employer subject to the requirements of Section 405—rather than the discharged employee—should bear the expenses associated with a disputed discharge, pending a final disposition of the merits of the claim, where the Secretary's preliminary view is that there is reasonable cause to believe the employee's side of the story. In view of the significantly smaller economic burden that is imposed upon the employer, and the importance to the success of the highway safety program of affording strong anti-retaliation protection, Congress's judgment should be upheld. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15

(1976) (discussing Congress's preeminent authority to "adjust[] the burdens and benefits of economic life").

Of course, "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey* v. *Montrym*, 443 U.S. at 12; see also *Loudermill*, slip op. 13 ("[a]t some point, a delay in the [post-deprivation] hearing would become a constitutional violation"). Here, Section 405 itself provides the necessary post-reinstatement procedural protections. It states that the post-reinstatment hearing "shall be expeditiously conducted," and sets a time limit for the issuance of a final order. 49 U.S.C. App. 2305(c)(2)(A); see also page 6 and note 4, *supra*.

The Court has indicated that even if a statute provides for a prompt post-deprivation hearing and the statutory scheme therefore complies with due process, the delay in a particular case may amount to a violation of due process. *Loudermill*, slip op. 13; *Barry* v. *Barchi*, 443 U.S. at 66. There is no occasion to consider the permissibility of the delay in the present case because appellee never was subjected to a deprivation of property—enforcement of the Secretary's order was enjoined by the district court. Accordingly, appellee cannot complain that its due process rights were violated by the length of the delay in issuing a final order.[26]

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[26] The time between the issuance of the temporary reinstatement order and the ALJ's issuance of his recommended decision—approximately nine months—is within the time limits that this Court previously has held to be permissible. See *Loudermill*, slip op. 13; *Mathews*, 424 U.S. at 342. The delay in the issuance of the Secretary's final decision in this

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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case is the result of a dispute regarding the ALJ's decision and the state of the evidentiary record. See Mot. to Aff. 5-6 n.4, A1-A9. There is no reason to believe that this delay is typical of proceedings under Section 405.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1530

WILLIAM E. BROCK, SECRETARY OF LABOR,
AND
ALAN C. McMILLAN, REGIONAL ADMINISTRATOR,
OCCUPATIONAL SAFETY & HEALTH
ADMINISTRATION,
Appellants,

vs.

ROADWAY EXPRESS, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), which provides that the Secretary of Labor—upon a finding of "reasonable cause to believe" that an employee in the motor transportation industry was discharged in retaliation for the employee's safety complaints—"shall" order the temporary reinstatement of the employee pendng a hearing regarding the reasons for the discharge, is invalid under the Due Process Clause of the Fifth Amendment because the Secretary is not required to afford the employer an evidentiary hearing before issuing the temporary reinstatement order.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes and Regulations

Miscellaneous

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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

1. *Nature of Case.* This is a direct appeal taken by the Secretary of Labor from an order of the United States District Court of the Northern District of Georgia declaring Section 405 of the Surface Transportation Assistance Act of 1982 ["Section 405"], 49 U.S.C. §2305(c)(2)(A), to be unconstitutional to the extent that it empowers the Secretary of Labor to order reinstatement of a discharged employee prior to conducting an evidentiary

hearing which comports with the minimum requirements of due process. The district court further declared that an order of the Secretary issued pursuant to Section 405 is violative of the requirements of procedural due process to the extent that it requires appellee, Roadway Express, Inc. ("Roadway"), temporarily to reinstate a terminated employee prior to an evidentiary hearing. Accordingly, the district court enjoined the Secretary from further issuance of preliminary orders of reinstatement pursuant to Section 405 without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process.

2. *Nature of the Constitutional Challenge.* On procedural due process grounds, Roadway challenges the issuance of an order of preliminary reinstatement which takes effect before the employer is, at a minimum, given a prior opportunity to present its side of the case in an adversarial hearing. Roadway contends that during the investigative stage of a Section 405 complaint, it is entitled to a hearing when the investigating authority initially concludes that the untested evidence gathered is sufficient to suggest reasonable cause to believe that a violation has occurred. At that time, in order to meet the requirements of procedural due process, the employer should be apprised of the specific facts which are alleged to constitute the Section 405 violation and should be provided an opportunity to test the reliability of the evidence offered against it, including a chance to confront and cross-examine the witnesses on whom the Secretary relies. In connection with such an adversarial hearing Roadway claims the right secured by the Fifth Amendment to shape its defense and to present its side of the case in the form of offering evidence, testimony and arguments specifically responsive to the evidence which the Secretary considers, in its un-

challenged state, to be sufficient to establish reasonable cause to believe that Section 405 has been violated.[1]

3. *The Facts and Procedural History of the Case.* On November 22, 1983, Jerry W. Hufstetler, an over-the-road truck driver based at Roadway's Lake Park, Georgia terminal was terminated by the manager to whom he reported, Archie Jenkins, for intentionally disabling his vehicle while at the St. Petersburg terminal in order to create overtime/delay pay[2]—an act of dishonesty subjecting him to immediate discharge under the terms of the National Master Freight Agreement, Southern Area Conference ("NMFA"), the labor agreement governing the terms and conditions of his employment. J.A. 86-87.

Hufstetler filed a grievance under his labor agreement. J.A. 33-34. The agreement provides that the employer may only discharge for just cause and further that an employee may not be required to operate unsafe equipment or operate equipment under circumstances which would violate any statute or regulation. J.A. 36-39. The grievance was submitted to the Multi-State Grievance Committee comprised of three management representatives

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1. Following the entry of findings of reasonable cause to believe that a violation has occurred, the employer is entitled to a full *de novo* hearing under Administrative Procedure Act ("APA") standards. 49 U.S.C. App. §2305(c)(2)(A). Roadway does not argue that an order of preliminary reinstatement may not be entered before that hearing or that a full evidentiary hearing of that nature must first be held. Nor did the federal district court so rule. It stated, "The court notes that a full evidentiary hearing prior to reinstatement is not required. *Mathews*, 424 U.S. at 343. Rather, it is sufficient that an employer be given, at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses." J.S. App. 8a-9a.

2. Through the first ten periods (300 days) of 1983 Hufstetler had collected $1,292.38 for 98.28 breakdown hours compared to the next closest employee who had $289.00 in breakdown pay. J.A. 74.

from carriers other than the affected employer and three Teamster officers who are not affiliated with the grievant's local. The NMFA provides that a majority decision of the Grievance Committee is final and binding on the parties. J.A. 80-83.

At the grievance hearing, the Company put on its evidence and made arguments; Hufstetler's representative, a business agent from his local union, put on evidence for him and made arguments; and Hufstetler testified and made arguments in his own behalf. Hufstetler and his union representative contended that Hufstetler did not commit the charged act of dishonesty and that the discharge was the result of retaliation by the St. Petersburg terminal manager, Mike Titus. Hufstetler claimed the previous friction between them was related to a prior equipment breakdown he had had while at the St. Petersburg terminal. J.A. 40-76. The Committee deadlocked and, under the terms of the contract, the case was then referred to the second step in the contractual grievance resolution process, the Area Committee. J.A. 80-89.

That committee is also made up of three managers from carriers other than Roadway and three Teamster officers unaffiliated with the grievant's local. J.A. 80-83. The Area panel made the transcript of the Multi-State Grievance Committee hearing a part of its record, and Hufstetler's business agent introduced additional evidence. On January 30, 1984, the Committee sustained the discharge (J.A. 77, 92), rejecting Hufstetler's claim that his discharge was not for "just cause" and thereby finding, as a matter of fact, that he had committed the charged act of dishonesty and had not been discharged for safety-related activity. By contract, the decision of the Area Committee is final and binding on the parties. J.A. 80-83.

One week later, on February 7, 1984, Hufstetler filed a complaint with the Department of Labor ("DOL") and claimed that he had been discharged because "[t]he St. Pete terminal manager was upset when [Hufstetler] requested costly repairs needed for truck driving safety, and was later terminated on a pretext of 'dishonesty'." J.A. 13. The DOL notified Roadway that Hufstetler had filed a complaint with the DOL office alleging a violation of Section 405 and solicited "a full and complete written account of the facts and a statement of [Roadway's] position in respect to the allegation that [Roadway had] discriminated against [Hufstetler] in violation of the Act." OSHA INSTRUCTION DIS .4A August 26, 1985, Directorate of Field Operations, Revised Section 11(c) Investigator Manual ("OSHA Investigator Manual"), Appendix A-5.[3] In response, Roadway submitted a written position statement with the supporting statements, transcripts and award from the Grievance Committee hearings.

During the course of the investigation, when the investigator stated that he intended to recommend the issuance of a "cause" finding and a preliminary order of reinstatement, counsel for Roadway asked DOL for the statements and evidence on which the investigator was relying. They were denied on the grounds of informant's privilege. J.A. 93. A meeting was held and, at that meeting, the Secretary's representatives did not disclose or discuss the statements on which the investigator was relying in forming his opinion that the Act had been violated nor were the names of the individuals supplying the evidence disclosed. J.A. 7, 14-15, 26, 93. Counsel to Roadway unsuccessfully attempted to persuade the Secretary's representa-

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3. For convenience, this publication was separately submitted by the Secretary to the Court. *See* Appellant's Brief at 5-6, n.3.

tives that it was inappropriate and contrary to national labor policy recognized in analogous DOL regulations to order immediate reinstatement and thus upset a final and binding labor contract arbitration award based on an adversarial proceeding, without first conducting an adversarial hearing themselves.[4] The Secretary also rejected Roadway's argument that Section 405 was constitutionally inadequate to the extent that it precluded a pre-deprivation adversarial hearing. J.A. 7, 14-15, 26.

On January 21, 1985, 349 days after Hufstetler's February 7, 1984 complaint to the DOL, the Secretary of Labor, through his Regional Administrator of OSHA, issued an order of immediate reinstatement.[5] J.A. 16-19.

Within 30 days of the Secretary's issuance of his reasonable cause finding and order of preliminary reinstatement, Roadway protested the entry of a final order, filed Objections to the Secretary's Findings and Preliminary Order, and requested a hearing on the record. J.A. 20-23.

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4. *See* 29 C.F.R. §1977.18. The Secretary has yet to issue regulations under Section 405. However, the substance of OSHA 11(c), 29 U.S.C. §660(c), and of Section 405, 49 U.S.C. App. §2305(a)(b), is the same. Common Field Operations Directives are utilized in the enforcement of these two statutes by DOL. *See* OSHA Investigator Manual. The Regulations issued under OSHA 11(c), 29 C.F.R. §1977.1-.23, while not binding the DOL in Section 405 cases, are a strong indication that the Secretary recognizes the value of labor arbitration proceedings in the resolution of factually parallel charges under the Act.

5. Section 405(c)(2)(A) provides that within 60 days of receipt of a complaint the Secretary shall conduct an investigation, make a determination, and notify the parties of his findings. 49 U.S.C. App. §2305(c)(2)(A). The Secretary treats the 60-day period as "directory." OSHA Investigator Manual at IX-7. A survey of 45 investigatory findings, in the public records of the Secretary and randomly known to Roadway's counsel, shows that only three were completed within 60 days. The range was from 50 days to 619 days with the average investigation being completed in 199 days. *See* Summary in Appendix A to this brief.

Following a hearing held during March 26-29, 1985, the presiding administrative law judge issued his initial Recommended Decision and Order on October 30, 1985.[6]

4. *The Secretary's Use of the OSHA Investigator Manual.* The Secretary of Labor contends that the Section 405 investigative procedures set out in the OSHA Investigator Manual and utilized to make decisions of preliminary reinstatement are sufficient to satisfy due process requirements. The Manual assigns to a regional investigator the responsibility for investigating complaints, resolving questions of credibility and reliability of evidence, and making recommendations to his supervisory investigator, who effectively recommends a decision and drafts the Secretary's Preliminary Findings and Order. The OSHA Regional Administrator signs and issues the findings and order on behalf of the Secretary of Labor. OSHA Investigator Manual, V-1 to VI-4, IX-1 to IX-7.

The Manual procedures are not the product of rulemaking and do not constitute formal regulations in implementation of Section 405. They do not emerge from the

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6. The statute states that the final order of the Secretary of Labor will be issued within 120 days of the conclusion of the hearing. 49 U.S.C. App. §2305(c)(2)(A). The Secretary, however, has interpreted the statute to require the issuance of a final order within 120 days after the issuance of a recommended decision by the ALJ. *See* Appellant's Brief at 6, n.4.

The Secretary issued a final order in the Hufstetler case on August 21, 1986, after the Secretary rejected and remanded the ALJ's first Recommended Decision and Order (J.S. App. 29a-43a) following receipt of Roadway's exceptions. *See* Motion to Affirm n. 4 and App. A. If Roadway had accepted the January 21, 1984, Order of preliminary reinstatement without challenging its constitutionality, and if the Secretary's August 21, 1986 final order had been favorable to the Company, Roadway would have been unjustifiably required to retain a previously discharged employee for a period of 19 months. The substance of the Secretary's final order, irrelevant to this inquiry, will be the subject of an appeal to the Eleventh Circuit Court of Appeals pursuant to 49 U.S.C. App. §2305(d).

beneficial rulemaking experiences of notice, comment, and hearing opportunity for the affected employer or employee regulatees. Moreover, they operate during the still formative period of Section 405. They are not associated with any significant contemporaneous construction by the DOL.

SUMMARY OF ARGUMENT

Section 405 of the Surface Transportation Assistance Act is unconstitutional because it mandates an order of preliminary reinstatement of a discharged employee based only on an investigative finding. The Act makes no provision for any adversarial hearing before the entry of the order which deprives the employer of the contractual right to discharge for cause.

This is not, of course, the first case in which this Court has been asked to address the right to a hearing before a preliminary deprivation of property or liberty. The Court has routinely recognized that

> [a]n essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank*, ... "[T]he root requirement" of the Due Process Clause [is] "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. *Boddie v. Connecticut* [cite omitted] (emphasis in original); see *Bell v. Burson* [cite omitted]. This principle requires "some kind of a hearing . . . ." *Board of Regents v. Roth* [cite omitted]; *Perry v. Sinderman* [cite omitted] . . . . [T]his rule has been settled for some time now. *Davis v. Scherer* [cite omitted.]

Cleveland Board of Education v. Loudermill, 470 U.S. ....., 105 S.Ct. 1487, 1493 (1985).

The Secretary does not disagree with this premise:

> We certainly do not dispute that an employer should be afforded an opportunity to be heard before the employer may be required to reinstate an employee on a temporary basis pending further review of the matter.

J.S. at 12. Nor does the Secretary dispute that Roadway's right to discharge an employee for cause constitutes a property interest entitled to the protection of the Fifth Amendment. J.S. at 11, Appellant's Brief at 16, 26.

Similarly, Roadway shares the government's interest in safety on the highways and supports the intent and purpose of the Act to encourage employees to report unsafe equipment or conditions. However, Roadway disagrees with the Secretary's contention that highway safety and encouragement of safety reporting will be adversely impacted by affording the employer a due process adversarial hearing during the investigative phase of a Section 405 complaint.

Roadway notes that nothing in the pertinent language of Section 405 precludes the Secretary from conducting some kind of an adversarial hearing prior to making findings of reasonable cause to believe that the Act has been violated and entering an order of reinstatement. Thus, the Court may construe Section 405 to require a prior evidentiary hearing opportunity as part of the investigation procedure directed by the statute. This could be accomplished by rejecting the Secretary's use of the OSHA Investigator Manual's unilateral investigation procedures to make his reinstatement decision. Such analysis avoids declaring the statute unconstitutional. *See Califano v. Yamasaki*, 442 U.S. 682 (1979).

To the extent that Section 405 calls for an order of preliminary reinstatement based on a unilateral investi-

gation and decision-making procedure, and is read to exclude any adversarial hearing opportunity during the investigation procedure, it is unconstitutional. An analysis of a Section 405 reinstatement claim under each of the criteria in *Mathews v. Eldridge*, 424 U.S. 319 (1976) (the private interest being affected by the governmental action; the risk of erroneous deprivation; and the nature of the governmental interest) shows that the statute is constitutionally flawed.

The Secretary's order to reinstate a discharged employee without a minimal prior adversary hearing deprives employers of a substantial property right. Under the statute and the Secretary's procedure, the duration of preliminary reinstatement is indeterminate. The consequences to efficiency, discipline in the workplace, and the morale of the employer and fellow employees are significantly impacted. Roadway, a party to a collective bargaining agreement containing a provision for final and binding resolution of contract disputes, loses the benefit of its bargain when the arbitration result in a case factually parallel to a corresponding Section 405 complaint is upset by an order of preliminary reinstatement. Moreover, the employees below the temporarily reinstated employee in seniority are financially impacted with no remedy if the Secretary has made an error. The private interest of the employer is substantial.

In the absence of a prior evidentiary hearing, the cumulative risk of an erroneous deprivation under Section 405 is particularly high because 1) the factual issue of retaliatory motive is inherently subjective, 2) the government investigation combines the functions of prosecutor and decision-maker, and 3) the investigative proceeding excludes the opportunity for the respondent to know the

specific evidence submitted against it, to controvert it, and to mold its defense to the evidence actually being considered. Without such an evidentiary hearing, the Section 405 decision-making process which results in the deprivation of the employer's private interest is unconstitutional.

Significantly, the governmental interest in the statutory purpose of encouraging the reporting of unsafe equipment or practices, would not be adversely impacted by an evidentiary hearing during a Section 405 investigation. Both the statute and the Secretary's practice under it recognize that a Section 405 complainant will not be reinstated until the completion of the investigation required by the Act and entry of an order by the Secretary. Thus, affording the employer a due process hearing in the investigatory interim will have no impact on the statutory scheme that seeks to avoid only extraordinary delays in reinstatement. Moreover, under other "whistleblower" statutes administered by the DOL there are procedures already in place to conduct and complete an investigation and an evidentiary hearing within the time frame contemplated by Section 405 and more rapidly than under current Section 405 practice.

This Court has addressed the question of what kind of pre-deprivation procedures are necessary in a number of contexts. In cases of parole revocation,[7] prison discipline,[8] public sector employment rights,[9] student discipline,[10] loss

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7. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *see Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

8. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

9. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985).

10. *Carey v. Piphus*, 435 U.S. 247 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975).

of public welfare[11] and social security benefits,[12] replevin or garnishment of property with judicial assistance,[13] and the revocation of licenses,[14] the Court has recognized that due process requires "some kind of a hearing" before a temporary or preliminary deprivation of property may take place. In this case, "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." [cites omitted] *Goldberg v. Kelly*, 397 U.S. at 269.

The district court correctly concluded that Section 405 cases by their nature involve the resolution of disputed issues of fact and credibility. The attendant risk of erroneous deprivation demands that the employer first be given the opportunity to defend itself in an evidentiary hearing which affords it at least minimium due process protections. Those protections include the right to know the evidence being considered; the opportunity to shape a defense in response to the claimed facts; and the right to challenge the facts and their sources for reliability, completeness and credibility in an adversarial hearing. The district court declaration that Section 405 is unconstitutional to the extent that it precludes these protections should be sustained.

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11. *Goldberg v. Kelly*, 397 U.S. 254 (1970)

12. *Califano v. Yamasaki*, 442 U.S. 682 (1979); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

13. *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

14. *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977).

ARGUMENT

I. The Court May Construe Section 405 To Require A Prior Evidentiary Opportunity Within The Contemplated Investigation; Reject The Secretary's Adaptation Of The OSHA Investigator Manual; And Thereby Avoid Declaring The Statute Unconstitutional.

Nothing in the pertinent language of Section 405 precludes the Secretary from conducting an adversarial hearing prior to the Secretary's reasonable cause finding and order of preliminary reinstatement:

> (2)(A) Within sixty days of receipt of a complaint filed under paragraph (1) of this subsection, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify the complainant and the person alleged to have committed a violation of this section of his findings. Where the Secretary of Labor has concluded that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief [of, *inter alia*, reinstatement with pay]. Thereafter, [a party] may, within thirty days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be expeditiously conducted.

49 U.S.C. App. §2305(c)(2)(A).

As the district court concluded, the provision operates unconstitutionally "*to the extent* that it requires the [employer] to temporarily reinstate the [terminated employee] prior to an evidentiary hearing." (emphasis supplied).

However, as a constitutional cure, "a full evidentiary hearing prior to reinstatement is not required." Rather, "it is sufficient that an employer be given, at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses" before he is ordered to reinstate the complaining employee. J.S. App. 8a-9a.

Consequently, the Court may resolve the present controversy by means of statutory construction requiring a reasonable evidentiary opportunity for the employer before the Secretary's decision of reinstatement. This resolution comports with close-fitting precedent, *Califano v. Yamasaki*, 442 U.S. at 696-697 (1979); preserves the essential ends and means of the statute; and promotes reliable fact finding of the contentious and generic question of employer retaliation lodged at the center of a typical Section 405 dispute.

In *Yamasaki*, the Court read a silent, facially neutral statutory provision to afford an oral hearing opportunity to Social Security recipients who were facing government recoupment of overpayments unless they could show absence of fault in their receipt of the over payment and hardship from the recovery. The relevant hearing-neutral language, 42 U.S.C. §404(b), provided:

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

However, the Secretary does not read Section 405 as allowing a construction permitting an adversarial hearing during the investigation. Therefore, the constitutionality of the statute itself must be analyzed.

In Section 405 cases, the Secretary must resolve "questions of credibility and reliability of evidence" before entering an order of preliminary reinstatement. OSHA Investigator Manual, at VI-3. Questions of fault, motive, intent, reasonable belief and other similar variables are central to any determination by the Secretary whether there is reasonable cause to believe that the Act has been violated. Thus, some kind of an adversarial hearing is necessary before a deprivation order may issue. Throughout its deprivation/due process cases, the Court has recognized that such factual questions must be resolved by other than a unilateral, non-adversarial process. *See Califano v. Yamasaki*, 442 U.S. 682 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *cf. Mathews v. Eldridge*, 424 U.S. 319 (1976); *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985).

The Court has developed three criteria for evaluation of the constitutionality of a governmental taking of a private interest prior to a hearing. These criteria emerged from *Mathews v. Eldridge* and have continued as the basis for analysis in subsequent cases, *e.g., Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1494; *Mackey v. Montrym*, 443 U.S. at 10; *Dixon v. Love*, 431 U.S. at 112-13. The factors are:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

> interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

A more detailed analysis of the constitutionality of the statute under the light of the *Mathews* criteria follows.

II. The Secretary's Reinstatement Of Discharged Employees Without A Minimal Prior Adversary Hearing Deprives Employers Of A Substantial Property Right.

A. The Reinstatement Duration.

The Secretary concedes the substantial, and therefore constitutionally protected, property interest at stake:

> Appellee had a contractual right to discharge its employees for cause. Although the power of Congress to regulate in this area is very broad, we do not dispute that the appellee's right to discharge constitutes a property interest protected by the Due Process Clause and that the Secretary's order—had it gone into effect—would have deprived appellee of this interest by requiring the reinstatement of an employee previously dischargd by appellee.

Appellant's Brief at 16, footnotes omitted.

Further, the Secretary acknowledges that the affected property interest expands directly with the protraction of the interim reinstatement. (*Id.* at 49, citing accurately *Mackey v. Montrym*, 443 U.S. at 12 and *Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1498):

> Of course, "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved."

The government goes on to suggest that Section 405(c) effectively cures the constitutional problem by the requirement of an "expeditiously conducted" post-deprivation hearing. *Id.*

Less obviously, but nonetheless inevitably, the Secretary admits the true magnitude of the duration of the imposed reinstatement as a matter of regular operation of the statute. *Id.* at 49 & n.26; 6 & n.4. Following the entry of an order of preliminary reinstatement, the employer's objections and request for hearing do "not operate to stay [the] reinstatement remedy." 49 U.S.C. App. §2305(c)(2)(A). The statute requires the expeditious hearing to proceed before an administrative law judge, and the ALJ to issue a recommended decision to be reviewed by the Secretary. *Id.* "Upon the conclusion of such hearing, the Secretary of Labor shall issue a final order within one hundred and twenty days." *Id.* While the plain language marks the 120-day period from the conclusion of the hearing, the Secretary has interpreted it to begin at the point of the ALJ's rendition of a recommended decision. Motion to Affirm at 15-16; Appellant's Brief at 6, n.4. Thus, the statutory scheme includes an indeterminate interim period during which the ALJ formulates and issues his decision upon the issue of retaliation. Predictably the interim can be substantial. The hearing before the ALJ in this case was scheduled for March 26-29, 1985, sixty-seven (67) days following the issuance of the order of preliminary reinstatement. After the conclusion of post hearing matters, the ALJ submitted a recommended decision and order to the Secretary on October 30, 1985. The Secretary remanded the case to the ALJ and a second recommended decision and order was submitted to the Secretary who, on August 21, 1986, issued

his own final decision and order. The total potential deprivation illustrated in this case was nineteen months.[15]

The nature of the factual questions at issue (employer retaliation for safety hazard "whistleblowing" or "reasonable" apprehension that there is an unsafe condition which presents a bona fide danger of serious injury) and the

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15. The Secretary attempts unconvincingly to palliate the magnitude of the deprivation.

He proposed that "[t]here is no occasion to consider the permissibility of the delay in the present case" because Roadway achieved preliminary injunctive relief from the district court and thereby avoided the deprivation of which it complains. Appellant's Brief at 49. This observation begs the ultimate issue of the case. The constitutionality of a statute does not improve because a plaintiff gained a preliminary injunction against its ostensible unconstitutionality. Nor should those subject to a statute have to resort to relief from the federal district courts if the enactment is invalid.

Further, the Secretary suggests that the time span between the issuance of the reinstatement order and the ALJ's release of his first recommended decision—approximately nine months—falls within limits constitutionally permissible in *Loudermill* and *Mathews*. Appellant's Brief at 49, n.26. This use of *Loudermill* seems mistaken. The Court was examining the separate validity of delay in post-deprivation hearings only *after* it had concluded that some kind of pre-deprivation hearing opportunity was constitutionally necessary. 105 S.Ct. at 1496 and n.12. In *Mathews* the Court countenanced a potential delay of approximately 11 months in the administrative determination of Social Security disability benefit eligibility because, *inter alia*, (1) eligibility was unrelated to financial need and to collateral sources of benefits and (2) a successful applicant received full retroactive payments. 424 U.S. at 340-41. Neither feature is relevant to the coerced employment relationship presently at issue.

Somewhat defensively the Secretary insists that Roadway "has not shown that the length of the delay in this case is typical of Section 405(c) proceedings generally." Appellant's Brief at 30, n.14. However, there is no limit on the period of time within which a hearing must then be held and a recommended ALJ decision entered; and under current practice 120 days can be added to that elastic period of time for the Secretary to issue his final order. *See* Appellant's Brief at 6, n.4. The employer would, presumably, not be free to reinstitute its discharge decision until the Secretary entered a final order that the employer's discharge action was not, in fact, a violation of Section 405.

Secretary's strained application of the 120-day standard belie the "expeditious" character of the subsequent hearing. It is not enough for the DOL to posit that Section 405(c) is self-healing because it includes a clause for a subsequent expeditious hearing. Once the affected party possesses a constitutionally protected property right, the Constitution —and not the related statute—determines the appropriate procedural protection. *See especially Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1493; and *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (concurring opinion of Powell, J.) (cases collected).

Those courts ruling thus far upon the quantum of injury suffered by an employer from a reinstatement order coercing an unwanted employment relationship without a prior adversarial evidentiary hearing opportunity have acknowledged the substantiality of the "potential" for the "prolonged retention" of an unsatisfactory employee. *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 704 (6th Cir. 1985), *reh. denied and modified*, 781 F.2d 57 (1986), and decision below, J.S. at 7a.

B. Consequences To Efficiency, Discipline, And Morale Of The Employer And Fellow Employees.

During reinstatement, the employer bears a variety of unwanted consequences.

First, for lack of an adversarial hearing opportunity, the employer has been unable to demonstrate the validity of the grounds of discharge. These may range from dishonesty (intentionally disabling trucks, as alleged here), unsafe behavior, willful damage of company property, unprovoked physical violence, inefficiency, employee friction, the violation of work rules or directives, and the like.

See J.A. 86-88. Reinstatement brings back to the employer the risk of repeated misconduct; the perception of that risk to other employees; and resulting danger to discipline, morale, and harmony among the employer and its workers.

Secondly, the forced reinstatement has immediate tangible consequences. In the present case, the reinstatement of Hufstetler to his prior seniority position would carry with it a chain of seniority position displacements, which in turn dictates such matters as bidding for driving assignments with corresponding pay differentials, as well as other seniority related issues such as layoffs, recalls, and vacation selection. Such seniority displacement would result in layoff of the junior-most driver.[16] J.A. 80-83. Such consequences are intrinsic to the employment relationship, both public and private, and would continue, following pre-hearing reinstatement, for the duration of the Secretary's procedures. The promotion of "employee efficiency and discipline" dictates that an employer

> must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Arnett v. Kennedy, 416 U.S. at 168 (separate concurring opinion of Powell, J.).

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16. *Compare, Mack v. Air Express International*, 471 F. Supp. 1119, 1125 (N.D.Ga. 1979) (An innocent employee displaced by a mistaken preliminary order has no remedy.)

C. Loss Of The Arbitration Provision Of The Collective Bargaining Agreement.

As the district court additionally observed, the employer here suffers the effective loss of a valued bargained-for element of the employment contract—the arbitration process with its regime of procedural fairness for both sides of the employment dispute.

> In this instance, the arbitration panel, after a lengthy hearing, sustained Hufstetler's discharge for an act of dishonesty. The statutory scheme however, required Roadway to reinstate, for possibly a four-month period, an arguably unsatisfactory employee, in violation of its collective bargaining agreement and at the expense of innocent employees. Certainly, Roadway's interests in not doing so are substantial.

J.S. at 7a.

The contractual benefit of final and binding arbitration must enter into the calculation of an employer's property loss for purposes of constitutional analysis. For the employer, the interest is a critical one as recognized by the consistent decisions of this Court and scholarly literature.[17]

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17. In articulating that the national labor policy favors voluntary resolution of labor contract disputes through the negotiated grievance arbitration proceedings in collective bargaining agreements, the Court, in two of the *Steelworkers' Trilogy* cases, specifically recognized the property interest in a final and binding grievance resolution clause in the labor agreement. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for . . . .") Similarly, the Court recognized the property interest in final and binding arbitration clauses in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (the parties "should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."). This property interest was again recognized in *Schneider Moving and Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984) (an arbitration clause and the corresponding peaceful resolution of labor disputes is one of the "parties' presumed objectives in pursuing collective bar-

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III. In The Absence Of A Prior Evidentiary Hearing, The Cumulative Risk Of An Erroneous Deprivation Under Section 405 Is Particularly High (A) Because The Factual Issue Of Retaliatory Motivation Is Inherently Subjective; (B) Because The Government Investigator Combines The Functions Of Prosecutor And Decision-Maker; And (C) Because The Investigative Proceeding Excludes The Opportunity For The Respondent To Controvert Specifically The Evidence Submitted Against It. Moreover The Department Of Labor Can Readily Provide A Rudimentary Evidentiary Opportunity Of The Kind Already Furnished By It In Analogous Classes Of Cases.

The second of the *Mathews* factors is an instruction to consider the "risk of an erroneous deprivation of [the] interest through the procedures used, and the probable

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Footnote continued—

gaining"). Further recognition of arbitration as a valuable contractual property interest of the employer can be found in A. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1496-1497 (1959).

The argument of the *amicus* Teamsters for a Democratic Union ("TDU") (TDU *amicus* brief at 10-15) misconceives the significance of contractual grievance-arbitration for purposes of analysis under the criteria of *Mathews v. Eldridge*. It presses the unchallenged point that collectively bargained arbitration cannot supersede public health and welfare legislation such as Section 405. Roadway does not argue otherwise. Our point—unaddressed by the TDU *amicus*—is that the employer's contractual right to final and binding arbitration must enter the *Mathews* balance as a valued element of its total property interest. The employer has bargained and paid for a grievance/arbitration clause containing an adversarial decision-making process which is much more reliable than a unilateral investigator decision-making process. This critical property interest is utterly gutted by the Section 405 non-adversarial procedures. The risk of error inherent in upsetting an adversarially based final arbitration award with an order of reinstatement based only on an investigation is also significant. *See* §III, *infra*.

value, if any, of additional or substitute procedural safeguards." The Secretary contends that under Section 405

> an employee who alleges that he was discharged in violation of Section 405 must be reinstated on a temporary basis, *without a prior evidentiary hearing*, if the Secretary finds reasonable cause to believe that the discharge was *in fact* retaliatory.

Appellant's Brief at 12 (emphasis supplied). The Secretary argues that the Act's pre-order investigation and decision-making process called for in Section 405(c) is a constitutional substitute for a pre-deprivation adversarial hearing since the employer is entitled to secure a full evidentiary hearing following the order of preliminary reinstatement. *Id.* This analysis does not comport with the Court's analyses of the risk-of-error criterion.

A. A Prior Evidentiary Opportunity Is Constitutionally Necessary Because The Factual Issue Of Retaliatory Motivation Is Inherently Subjective And Controversial.

The "root requirement" of the Due Process Clause is "[the] opportunity for a hearing *before* [being] deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original), *cited in Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1493.[18] The Secretary argues that the Constitution does

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18. The Court's most recent decisions appear to have settled the constitutional presumption in favor of a prior, rather than a subsequent, hearing opportunity for a party suffering the deprivation of a property interest. *See especially, Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1493. "This principle requires 'some kind of a hearing' *prior* to the discharge of an employee who has a constitutionally protected property interest in his employment." (Emphasis added, citations omitted). Moreover, "this rule has been settled for some time now." *Id. Accord,*

(Continued on following page)

not, however, require any kind of an evidentiary hearing and, quoting *Loudermill*, that in "only one case, *Goldberg v. Kelly*, 397 U.S. 254 (1970) [has] the Court required a full adversarial evidentiary hearing prior to adverse governmental action." Appellant's Brief at 23. This view ignores the fact that the Court has never sustained a deprivation of a protected interest without some kind of an adversarial hearing in circumstances of disputed credibility, except in those few limited situations of governmental emergency.[18] In each deprivation case involving disputed facts hinging on the reliability of the evidence and the

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Footnote continued—

Davis v. Scherer, 468 U.S. 183, 192. n.10 (1984) and *Boddie v. Connecticut*, 401 U.S. at 379. The Court's use of this authority in *Loudermill* suggests that it has eclipsed the dictum of *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974), that for purposes of a property interest, the hearing opportunity may usually follow the deprivation.

19. The Court has recognized the government's right in an "emergency situation" to take summary administrative action without a prior hearing. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981). Those situations are limited to seizures "directly necessary to secure an important governmental or general public interest" where there is "a special need for very prompt action" and where the governmental official making the seizure decision has made his determination "under the standards of a narrowly drawn statute, that [the seizure] was necessary and justified in the particular instance." *Fuentes v. Shevin*, 407 U.S. at 91. The types of situations permitting emergency action have included actions to "protect against the economic disaster of a bank failure," "to protect the public from misbranded drugs and contaminated food," and "to meet the needs of a national war effort." *Id.* at 92 (with collected citations).

Emergency seizures have been distinguished from routine preliminary deprivations in *Bell v. Burson*, 402 U.S. at 542; *Goldberg v. Kelly*, 397 U.S. at 263, n.10; and *Hodel*, 452 U.S. at 301. The prehearing preliminary reinstatement provision in Section 405 obviously does not fall into an emergency category of seizures designed to avoid immediate and irreparable injury. The statute itself recognizes this in its suggested 60-day investigation period, a period that is viewed as "directory" by the Secretary. OSHA Investigator Manual at IX-7.

credibility of witnesses, the Court has required an evidentiary hearing before deprivation. *See especially Goldberg v. Kelly*, 397 U.S. at 268 ("effective opportunity to defend by confronting any adverse witnesses and by presenting . . . arguments and evidence orally"); *Bell v. Burson*, 402 U.S. at 542 (state "must provide a forum for the determination" of fault before deprivation); *see also, Wolff v. McDonnell*, 418 U.S. at 557-67 (evidentiary hearing); *Morrissey v. Brewer*, 408 U.S. at 485-87 (evidentiary preliminary hearing); *cf. Califano v. Yamasaki*, 442 U.S. at 696 (a preliminary hearing to "assess the absence of 'fault' and determine whether or not recoupment would be 'against equity and good conscience'" is read into the Act).

By sharp contrast, in those cases in which the Court has held a hearing constitutionally unnecessary prior to an interim deprivation pending a final hearing, the factual predicate for the preliminary deprivation was objective in nature. In *Mathews v. Eldridge*, the factual basis of a preliminary revocation of social security benefits consisted of "routine, standard and unbiased medical reports by physician specialists." 424 U.S. at 344. The issue to be decided before termination of benefits was "a more sharply focused and easily documented decision than [a] determination . . . [on which] a wide variety of information may be deemed relevant, and [on which] issues of witness credibility and veracity often are critical to the decision making process." *Id.* at 343-44. Thus, for this and other reasons to be discussed below, the Court concluded that there was not a significant risk of erroneous deprivation. *See* Subsections B and C of this section at 27, 32, *infra*.

In *Barry v. Barchi*, 443 U.S. 55, the suspension of a race horse trainer's license before an adversary hearing

was sustained because the undisputable finding of drugs in the animal's urine raised a rebuttable presumption that the trainer was culpable or negligent, either of which circumstances was sufficient to support a license suspension. As the burden was on the trainer to prove that he was neither culpable nor negligent, and as he had the pre-suspension opportunity to offer whatever evidence he had to overcome the presumption, the Court found no constitutional need for a pre-suspension adversarial hearing.

In *Mackey v. Montrym*, the pre-hearing suspension of a driver's license for refusing to take a breath-alcohol test passed constitutional muster because the "predicates" for the suspension were "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him," thus minimizing the risk of error. 443 U.S. at 13.

The most recent case in this category, *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, also lacked the type of disputed facts which required an adversarial hearing for resolution before interim deprivation. A public sector employee had reported on his application for employment that he had no prior felony convictions. That statement was objectively untrue. The Court held that, under those circumstances, prior to discharge he was constitutionally entitled to be advised of the charge and given a chance to invoke the discretion of the decision-maker, including the right to offer plausible explanations of why the inference of intentional misrepresentation should not be drawn from the objectively misstated fact. Thus, the Court found no need for an adversarial hearing as the type of pre-deprivation opportunity offered gave the person who would suffer the loss an opportunity to explain himself to the satisfaction of the decision-maker.

Id. at 1489-90. The concurring opinion of Justice Brennan made clear that "[f]actual disputes [were] not involved" in *Loudermill*. *Id.* at 1499. On the other hand, inquiries involving fault and motive, as well as a wide variety of disputed facts on which "issues of witness credibility and veracity often are critical to the decisionmaking process," *Mathews*, 424 U.S. at 343-44, are separate and distinct from this line of cases as they, by their very nature, present a significantly greater risk of error in the deprivation decision.

B. A Prior Evidentiary Opportunity Is Constitutionally Necessary Because The Government Investigator Combines The Functions Of Prosecutor And Decision-Maker.

Another defect is inherent in the DOL's Section 405 non-adversarial, investigative decision-making process. The Department of Labor investigator blends the roles of prosecutor and decision-maker. Even if Section 405 cases were of the "objective evidence" character, this infirmity would be substantial. In tandem with the controvertible quality of the findings to be made - retaliatory motive or reasonable employee action - it is decisive. For, when the Court has denied preliminary evidentiary hearings, it has still recognized the right of the individual subject to a deprivation to have "an informed evaluation by a neutral official." *Fuentes v. Shevin*, 407 U.S. at 83. *See also Gibson v. Berryhill*, 411 U.S. 564 (1973) (the same administrative officer may not constitutionally serve as both prosecutor and adjudicator).

These fundamental safeguards disappear from the procedure used by the Secretary of Labor's representatives in making a determination whether there is reasonable

cause to believe that the employer has violated the Act. First, the investigator who makes the determination is operating under the same guidelines and directives utilized to build a case for prosecution under OSHA 11(c). *See* OSHA Investigator Manual, Chapters II-V, IX. OSHA 11(c) does not provide for preliminary reinstatement but calls on the Secretary to conduct an investigation and decide whether to file an action in district court. 29 U.S.C. §660(c)(2). Thus, the investigator wears both the hats of an agent of the prosecutor in building the case; and of an adjudicator by judging the facts he has gathered for credibility and reliability for the determination of "fault."

A review of the manual directives under which the DOL agent operates as both an investigator and decision-maker furnishes an illuminating contrast with the *Mathews* procedure which, in the absence of disputed facts, was found to be a constitutionally adequate substitute for an adversarial hearing. In *Mathews*, after noting that there was no "'spectre of questionable credibility and veracity'" present, the Court turned to an examination of the pre-deprivation procedures used by the agency. 424 U.S. at 344. First, the individual had "full access to all information relied upon by the . . . agency." *Id.* at 345-346. Second, "prior to the cut off of benefits the agency inform[ed] the recipient of its tentative assessment, the reasons therefor, and provid[ed] a summary of the evidence that it consider[ed] most relevant." *Id.* at 346. The recipient was invited "to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions." *Id.* Thus, "as contrasted with [the fact and credibility issues] before the Court in Goldberg," the recipient was able

to "'mold' his argument to respond to the precise issues which the decision-maker regarded as crucial." *Id.*

In direct contrast, the Section 405 investigative/decision-making process takes a prosecutorial approach. In the OSHA Investigator Manual, the investigator is first reminded of his function: "successful litigation of violations" requires a search "for protected activity, knowledge, animus and reprisal." OSHA Investigator Manual at V-3. The investigator is given directions for accomplishing his assigned task. He is instructed to contact the complainant to initially determine whether the complaint "may have merit." *Id.* at V-5. If he so concludes, he is to develop the "complainant's side of the investigation . . . as thoroughly as possible." *Id.* Having completed the development of the complainant's case, he is directed to "contact the respondent, notify the respondent of the substance of the complaint and arrange to meet with the respondent or its counsel to interview the appropriate witnesses." *Id.* The investigator is also instructed to send a letter to respondent simply notifying it that a complaint has been filed and asking for a "full and complete written account of the facts and a statement of . . . position in respect to the allegation. . . ." *Id.* at App. A-5.[20] The investigator is directed to obtain copies of

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20. A written position statement by a Section 405 respondent is not an adequate opportunity to respond. A basic flaw persists because any response will not be shaped to the specifics of the evidence unless the respondent knows those specifics. Moreover, without the identity of the persons making the allegations, and without the capacity to question their knowledge and motives, the veracity, reliability and completeness of the evidence cannot be tested and its value, if any, weighed. The Court in *Goldberg* recognized this fundamental deficiency in written submissions and rejected them as substitutes for a hearing:

> [W]ritten submissions do not afford the flexibility of oral presentations: they do not permit the recipient to mold his

(Continued on following page)

appropriate respondent records and, if not possible, to attempt to obtain a sufficient description to subpoena them. *Id.* at V-6, 7. After completing respondent's side of the investigation, he is instructed to recontact the complainant and his witnesses "to resolve any discrepancies or counter-allegations resulting from contact with the respondent." *Id.* at V-7. This completes the investigation.

The investigator is then responsible for evaluating the facts, resolving "[q]uestions of credibility and reliability of evidence" and preparing a "detailed discussion of the essential elements of a violation presented, plus a discussion of the *strengths and weaknesses of the case vis-a-vis respondent's possible defense . . . .*" *Id.* at VI-3 (emphasis supplied). He then prepares a recommendation for disposition of the case. *Id.* The investigator's supervisor reviews the recommendation in light of the evidence in the case file, *id.* at IX-6, and makes an effective recommendation to the Regional Administrator by drafting a Finding and Order in a merit case for the Regional Administrator's signature.[21] *Id.* An executed Finding and Order is mailed to the respondent with a letter advising that regardless of whether an objection is filed,

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Footnote continued—

> argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision.

Goldberg v. Kelly, 397 U.S. at 269.

21. The constitutional shortcoming in this review process was also considered in *Goldberg*, 397 U.S. at 269, "[T]he secondhand presentation to the decision-maker . . . has its own deficiencies: since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot be safely left to him."

> any portion of a preliminary order requiring reinstatement shall be effective immediately upon your receipt of the findings and order.[22]

OSHA Investigator Manual, App. F-2.

In sharp relief from the process at work in *Mathews*, the Section 405 investigative process operates with a pronounced prosecutorial orientation. The investigator does not function as an arbiter balancing countervailing bodies of evidence, but more closely as an agent of a prosecutor seeking to build a case.

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22. The Secretary notes at footnote 21 that the record does not indicate whether Appellee was informed of the substance of the evidence supporting the allegations. Appellant's Brief at 40, n.21. It is difficult without the introduction of extraneous, non-record materials to demonstrate to the Court what the Secretary may have considered in making his broad, non-specific "Findings and Preliminary Order." J.S. App. at 20a-23a. Roadway had submitted the unrebutted statements in the arbitration transcript (J.A. 40-77): Terminal Manager Titus saw Hufstetler's truck marker lights on when Hufstetler arrived at the terminal; he saw them go out when Hufstetler was in the truck after being redispatched on the clock; the Teamster who serviced the vehicle before its dispatch corroborated that he saw no lights out and that, if the lights had not been working, he would have noticed it; and a statement from an independent mechanic that a plug in the cab of the truck which would not have vibrated loose had, in his opinion, been intentionally unplugged. In direct contrast, the Preliminary Findings and Order merely recited that Respondent was discharged

> because he allegedly had created a false breakdown, an act of dishonesty . . . . Respondent's evidence to support the discharge is conjecture. Complainant has presented evidence to support his innocence. Respondent had threatened to do anything they could to catch the Complainant doing something wrong, to get rid of him.

J.S. App. at 21a.

Following a hearing on the merits, the ALJ issued a Recommended Decision and Order. J.S. 29a-43a. A review of his initial findings may give some indication of the nature of the evidence the complainant may have submitted to the investigator. J.S. 29a-43a. Compare with the evidence complainant submitted to his grievance committee. J.A. 40-77.

C. The Section 405 Investigative Process Improperly Excludes The Opportunity For The Respondent To Controvert Specifically The Evidence Submitted Against It.

In *Mathews* the Court acknowledged an affected party's entitlement "to all information relied upon" and the concomitant right to shape a defense directed to the evidence on which the agency is basing its decision. 424 U.S. at 346.[23] In a Section 405 proceeding, the factual de-

23. The Secretary argues that disclosure of the witness statements "at this early stage of the proceeding presents a very real threat to the integrity of the complaint investigation process." Appellant's Brief at 46. However, this assertion ignores the fact that it is at this stage of the process that the Secretary is resolving fact issues, making credibility and reliability determinations, and deciding whether to issue a reinstatement order. Roadway does not quarrel with the principle of informant confidentiality *until* the evidence from the informant is used in a proceeding which will result in a deprivation of its property interests. Under the Secretary's Section 405 procedures, that is when the investigator is deliberating on the question whether to issue an order of preliminary reinstatement. As the investigation constitutes the deprivation proceeding in current practice, Roadway is entitled to the evidence at that time. Of course, if some type of an adversary hearing were held before a neutral official and before a deprivation order issued, this problem would be remedied. Roadway would hear whatever evidence is being considered against it and could shape its defense and respond.

The "informant privilege" cases tacitly recognize that once the informant's testimony is used in an attempt to deprive another of a Fifth Amendment right, the individual whose interest is threatened has the right to that evidence in order to challenge it. The informant's privilege is conditional. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241 (1978); *Nemacolin Mines Corp. v. NLRB*, 467 F.Supp. 521, 524-25 (W.D.Pa. 1979).

This Court recognizes the principle that one being adversely affected by the testimony of another is entitled to know that testimony in order to respond. It has even applied this principle in the particularly difficult factual situations found in prison environments. "We also hold that there must be a written statement by the factfinders as to the evidence relied on and

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termination is intrinsically controversial, yet the respondent has no opportunity to controvert. Most fundamentally, the employer does not learn the specifics of the evidence against it. It responds to the investigator in a state of semi-darkness. It cannot contest those specifics. It has no chance to examine the witnesses in order to test for veracity, opportunity to know the facts offered, completeness, accuracy, faulty memory, context of the alleged retaliatory statements, malice, vindictiveness, a private political agenda,[24] prejudice, and the like. *See Goldberg v. Kelly*, 397 U.S. at 270 *quoting Greene v. McElroy*, 360 U.S. 474, 496-97 (1959):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injuries an individual, and

Footnote continued—

reasons' for the disciplinary action. *Morrissey*, 408 U.S. at 489 . . . . Without written records, the inmate will be at a severe disadvantage in propounding his own cause or defending himself from others." *Wolff v. McDonnell*, 418 U.S. at 564-65. The Court recognized that limiting the right in certain circumstances to a written statement is a radical departure from requiring the disclosure of all evidence considered as part of the pre-deprivation process as well as a departure from the right to cross-examine. This departure in *Wolff* and *Morrissey* was based on the recognition that in prison "[r]etaliation is more than a theoretical possibility," *id.* at 562, and that cross-examination in a prison setting "may trigger emotions and may scuttle the disciplinary process . . . ." *Id.* at 563. The principle of a right to know evidence, to respond to it and to the witnesses is clear. It is only in some limited prison situations involving grave danger that the Court reluctantly abridged that right, still subject to "further consideration and reflection." *Id.* at 572. Of course, in a Section 405 proceeding, the witnesses are protected by statute from retaliation, 49 U.S.C. §2305(a), and recognize that they lose their informer's privilege when the government uses their testimony.

24. The TDU *amicus* brief made it clear that there is a political enmity between it and the International Brotherhood of Teamsters, the recognized bargaining agent. *See* TDU *amicus* brief at 2, 11-14. This political division understandably has trucking companies often caught in the middle.

the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

See also 5 *Wigmore on Evidence*, §§1367-1368, pp. 32-39 (3d Ed. 1940) cited by the Court in *Greene*, 360 U.S. at 497.

D. The Evidentiary Hearing Opportunity Can Be A Practical And Efficient Process Of A Kind Already Furnished By The Secretary In Analogous Classes Of Cases.

The pre-deprivation hearing need not be a full evidentiary hearing nor need it be the hearing to resolve the final merits of the case. It is only necessary that the hearing provide sufficient safeguards "to prevent unfair and mistaken deprivation of property." *Fuentes v. Shevin*, 407 U.S. at 97. However, "it is axiomatic that the hearing must provide a real test." *Id. Goldberg v. Kelly*, in the context of welfare departments' "very burdensome case loads",[25] limited the pre-termination hearing to a proceed-

25. Section 405 has experienced approximately 25 to 60 merit cases per year. It is not known what percent of the merit cases involved discharges with preliminary reinstatement remedies. *See amici* brief of American Trucking Associations, Inc., *et al.* at 11 and n.8.

ing designed only "to produce an initial determination of the validity of the . . . grounds for [deprivation] in order to protect . . . against [error]" at the preliminary stage. 397 U.S. at 267. To guard against error in an initial determination of the credibility of the facts, the Court required the following: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity to defend by confronting any adverse witnesses"; and, (3) an effective opportunity to defend "by presenting . . . arguments and evidence orally." 397 U.S. at 267-68.

A similar prescription emerged from *Morrissey v. Brewer*, 408 U.S. at 485-87, defining a due process hearing for the determination of probable cause of a parole violation by a respondent. A constitutionally adequate hearing required (1) a "neutral and detached" person as an "independent decisionmaker," *id.* at 486; (2) notice of the allegations; (3) a right to question the persons who have given the adverse information; (4) the right to present a defense; and, (5) the right to a summary or digest record with a decision. *Id.* at 487.

For the Secretary, such hearings present no novel or difficult burdens. Through existing machinery, the Department of Labor presently conducts a number of such proceedings easily adaptable to the Section 405 investigative/decisional process. The Secretary is charged with investigating and enforcing the "whistleblower" provisions of the Safe Drinking Water Act, 42 U.S.C. §300j-9(i); Water Pollution Control Act, 33 U.S.C. §1367; Toxic Substances Control Act, 15 U.S.C. §2622; Clean Air Act, 42 U.S.C. §7622; and the Energy Reorganization Act of 1974, 42 U.S.C.

§5851.[26] The regulations promulgated under these Acts, 29 C.F.R. Part 24, call on the Secretary, on receipt of a complaint, to complete a field investigation within 30 days. *Id.* §24.4(d)(1). On the finding of a violation, the employer is given notice and within five days must request of the Chief Administrative Law Judge, by telegram, a hearing. *Id.* at §24.4(d)(3)(i). Within seven days thereafter, the parties are notified of a time and place for a hearing. *Id.* at §24.5(a). The Administrative Law Judge is to issue his recommendation within 20 days "after the termination of the proceeding at which evidence was submitted." *Id.* at §24.6(a). At this point in the procedures, the entire investigation, adversarial hearing and preliminary findings will be completed. Approximately 62 days will have passed from the filing of the complaint.

Comparison of this model with the Section 405 investigation is revealing. Upon receipt of a Section 405 complaint, a preliminary investigation is conducted to determine whether the complaint "may have merit." OSHA Investigator Manual V-5. This phase involves the gathering, examining and evaluating of a complainant's case evidence. Once the investigator reaches the conclusion that the complaint may be meritorious, he begins the

26. Each of these statutes is similar in substance to the "whistleblower" provision in Section 405. Each, however, is different in that these statutes, themselves, set out the procedures for the expedited issuance of a *final* order of abatement, reinstatement and other relief. They do not provide for preliminary or interim reinstatement. Nonetheless, the relevant parts of the investigation and hearing machinery already in place in the DOL to conduct prompt hearings under these statutes offers the Secretary one feasible method to provide a preliminary hearing as part of a Section 405 investigation. Such a hearing could be held after the investigator initially concludes that there may be reasonable cause to believe that a Section 405 violation has occurred. A hearing held at this point in time would have no adverse impact on Section 405's purpose of providing a speedy, and constitutional, preliminary reinstatement.

second step of the decision-making process. This second step is, in fact, the substitute for an adversary hearing. He notifies the respondent, takes its position and evidence, returns to the complainant to give him an opportunity to shore up his case, resolves credibility, reliability and fact issues, and makes a proposed Findings and an Order. The goal is to complete this process in 60 days, although that period of time is "directory." The second step of the Section 405 investigation could be constitutionally cured with a notice and hearing procedure tailored to meet the demands of a "reasonable cause" determination within the time constraints imposed under 29 C.F.R. §24.4-.6. The government's interest in a rapid resolution of the reinstatement question would not suffer delay, especially in light of both the statutory period to investigate and to enter a prelminary order, and the present lethargy of the investigative process.

In sum, the flaws inherent in the present Section 405 investigation render the risk of error unacceptably and unnecessarily high. Therefore, the Act is unconstitutional.

IV. A Prior Evidentiary Hearing Would Not Frustrate The Government's Objective Of Speedy Reinstatement Or Implicate Additional Administrative And Fiscal Burdens.

A. The Affirmative Purpose Of An Expeditious Preliminary Decision.

Roadway subscribes equally to the highway safety purposes of the Surface Transportation Assistance Act. With the public and the government, it shares a fundamental interest in the safest possible conduct of its business so as to preserve the welfare of its employees, the property of its customers as well as its own, and the safety,

confidence, and respect of the motorists and the citizenry at large. For the same reasons it concurs in the encouragement of valid safety complaints both to the Company and to the Department of Labor, as necessary, and wishes employees to report hazards without fear or inhibition from the prospect of retaliation.[27]

However, we must vigorously dispute the Secretary's insistence that speedy reinstatement of deserving "whistleblowers" requires elimination of any prior evidentiary hearing opportunity and continued adherence to a purely investigative process. As the language and operation of the statute reveal, somewhat strikingly so in this case, a slow and cumbersome investigation may leave the employee in a state of unemployment far longer than an efficient prior adversarial hearing. The Secretary's essential justification for the exclusion of a hearing is a *non sequitur*. The investigative process does not necessarily return the meritorious "whistleblower" to work more quickly than an evidentiary hearing opportunity; nor does it offer him the prospective assurance of such superior speed. This operation of the statute does not demonstrably promote its avowed public purpose.

First, Section 405(c) itself allots the Secretary 60 days from receipt of the complaint for the conduct of the investigation of the charge of retaliation. 49 U.S.C. App. §2305(c)(2)(A). Moreover, the Secretary views the time span as "directory", rather than mandatory, and will exceed it in many instances. OSHA Investigator Manual at IX-7. In this case the investigation lasted 11 months (J.A.

27. The Secretary devotes considerable exposition to general safety objectives, with which we do not quarrel (Appellant's Brief at 30-36), but relatively brief treatment of the premise on which he hinges the case: assuredly speedier reinstatement in the absence of a hearing. *Id.* at 36-38.

79), and a survey of the cases known to counsel shows that investigations have ranged up to 619 days with the sample average being 199 days. *See* Appendix A to this brief. Thus, the Congress by statutory provision and the Secretary by his operation recognize that a period of discharge during an investigation will not significantly detract from the Act's purpose.

Further, the employee in this case used Section 405(c) not as an exigent remedy of first resort, but rather as a backup program after the collective bargaining grievance-and-arbitration process had, with comparative expedition, resulted in a rejection of his retaliation claim within 10 weeks of his discharge (and after a first panel had been deadlocked). All told, the employee spent thirteen months (November 22, 1983 to January 21, 1985) out of work before the Secretary entered his Order of Preliminary Reinstatement. J.S. App. 3a, 20a-23a. If the swift vindication of rights is the linchpin of the Secretary's justification of the hearing void, it goes unsupported by the text and operation of Section 405(c).

Second, the Secretary's claim of inevitable reinstatement delay, and concomitant discouragement of safety complaints on the part of employees, rests upon an assumption unsupported by reasoning or events of the present record. The assumption is plain:

> Requiring the Secretary to afford the employer an evidentiary hearing before ordering the temporary reinstatement of a discharged employee would thwart the accomplishment of Congress's purpose by delaying relief for employees who engage in safety-related activity. Indeed, the employer would be able to make use of the hearing and any possible appeal to delay the reinstatement of the employee. . . . Mandating a prere-

> instatement evidentiary hearing thus would enable employers to continue to retaliate against an employee by prolonging the employee's unemployment.

Appellant's Brief at 37-38. Yet no statutory language or experience indicates any ability of the employer to control the timing and scope of the prior evidentiary hearing. The elements of administrative control would remain entirely with the Secretary. Indeed, the DOL conducts and controls such prior evidentiary hearings in a variety of statutory programs protecting employees against discriminatory treatment and processing their entitlements to reinstatement. *See* 29 C.F.R. Part 24 and discussion at pp. 35-36 *supra*. The Secretary has offered no reason why he could not similarly administer an expeditious pre-reinstatement hearing process, to the benefit of employer and employee alike, under Section 405(c). He has not identified any specific capacity for obstruction of such a process on the part of the employer. The argument of inevitable delay is simply unsubstantiated.

B. The Avoidance Of Undue Fiscal And Administrative Burdens.

A prior evidentiary opportunity would not add appreciably, if at all, to the fiscal or administrative task of the preliminary reinstatement decision.[28] As the district court pointed out, the necessary proceeding need not approach a full blown adjudication: "The court notes that

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28. The Secretary relegates this criterion to a single paragraph premised upon the assumption that employers will universally invoke a hearing and that it must always entail further effort and cost in the aggregate. Appellant's Brief at 38. However, LOL offers no figures to portray Section 405(c) as a massive genre of administrative litigation akin to welfare benefit programs. *See, e.g., Mathews v. Eldridge*, 424 U.S. at 347. Compare the statistics set out in the *amici* brief of the American Trucking Associations, Inc., *et al.* at 11.

a full evidentiary hearing prior to reinstatement is not required. *Mathews*, 424 U.S. at 343. Rather it is sufficient that an employee be given, at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses." J.S. App. at 8a-9a.

Indeed a prior adversarial hearing seems more likely to reduce the aggregate fiscal and administrative investment of the Secretary in Section 405(c) proceedings. As described, the DOL pre-reinstatement investigation constitutes a protracted and cumbersome exercise. Appellant's Brief at 39-41 and notes 19-20. The investigator undertakes a lengthy inquiry. Several layers of DOL personnel review the investigative report: the original investigator; a supervisory investigator; a representative of the Office of the Solicitor of Labor; and the Regional Administrator. J.A. 93-94. Not surprisingly, this circuitous course on the average runs over 199 days,[29] especially since the ultimate issues are the inherently subjective questions of motivation [Section 405(a)] or the reasonableness of an employee's apprehension about an unsafe condition. [Section 405(b)]. A focused, controverted hearing could displace weeks or months of investigative efforts. Even with reasonable lead time of several weeks for hearing preparation by each side, the process could not operate more dilatorily than the existing investigative system. An airing of the facts may even promote settlement.

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29. *See* Appendix A to this brief.

V. The Thesis Proposed By The TDU Amicus Brief, That The Secretary's Application For Injunctive Relief In A District Court Should Serve As An Adequate Constitutional Substitute For A Prior Evidentiary Hearing In The Section 405(c) Administrative Process, Is Unsupportable As Both Law And Policy.

We address briefly the novel proposal of the American Teamsters for a Democratic Union (TDU) that under Section 405(c) the employer can achieve an adequate due process hearing opportunity in response to an application by the Secretary to a federal district court for injunctive enforcement relief in lieu of the prior administrative evidentiary hearing opportunity required by the district court here. TDU *amicus* brief at 15-22. For a variety of reasons, this argument lacks support in both law and practice.

As a matter of law, the position rests in part upon an interpretation of Section 405(c) reinstatement orders contradictory to the Secretary's own characterization of them. The Secretary regards them as mandatory and enforceable in accordance with Section 405(e). Recognizing that the compulsory nature of such orders strengthens the claims of the employer to due process during the Secretary's underlying investigation, *id.* at 16, TDU advances an "alternative construction" that the Secretary's reinstatement order comprises a

> prosecutorial decision to initiate a preliminary injunction action under Section 405(e). In that event, it is in the courts that the employer would receive the process that is due." *Id.* at 18-19. "Under this analysis of the statute, the only due process issue would be whether failure to grant employers a full evidentiary hearing in the course of the judicial preliminary injunction proceeding is unconstitutional under the circumstances.

Id.

This hypothesis travels a great distance from the plain language of Section 405(c) and has no doubt come as a surprise to the Secretary.[30] The statute provides that, where he has found reasonable cause to believe that a violation has occurred, he shall issue "a preliminary order providing the relief" of reinstatement among other remedies. Absent a violation of the order, Section 405 makes no mention of any further necessity or occasion for the Secretary to seek injunctive enforcement of the reinstatement order in district courts. Further, it is axiomatic that the interpretation and application of statutes by administrative agencies charged with their enforcement will receive reasonable deference from the courts. *E.I. Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977); *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1973); *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969); and *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In the present instance, both plain text and practical agency application converge against TDU's proposition.

Further, the TDU reasoning springs from the fallacious premise that *any* pre-reinstatement hearing opportunity will defeat the congressional goal of speedy and reliable reemployment for victimized "whistleblowers." TDU *amicus* brief at 18.[31] As discussed above, a prior hearing

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30. Apparently, the Secretary might wonder whether, with an *amicus* like this, he needs an adversary. *See* TDU *amicus* brief at 18:

> We offer an alternative construction of the statute, however, because we do not share the Secretary's confidence that Section 405 can be construed [in the manner advanced by him] and still pass due process muster.

31. TDU posits:

> But if the Secretary must conduct an evidentiary hearing, however informal, in order to satisfy due process standards,

(Continued on following page)

opportunity could and should take place during the period of investigation.[32] A hearing during that period does no harm to the statutory purpose of speedy and just determination and, ironically, may accelerate reinstatement in appropriate cases. We have no textual or legislative history signals that Congress contemplated so different a process as suggested here.[33]

Other practical defects follow the TDU statutory construction. Apart from the legal character of the Secretary's reinstatement order as mandatory rather than precatory, TDU's interpretation of Section 405(c) discourages the norm of obedience by a regulatee to a directive of a duly competent government agency, and substitutes a presumption of preliminary disobedience as a regular avenue to the regulatee's due process entitlement.[34] Regularized disrespect for the Secretary's reinstatement order seems unlikely to have constituted the congressional intent or to comprise a healthy regime of administrative law.

Furthermore, the district court has no statutory authority to receive or evaluate evidence relating to the substantive Section 405 issue or to substitute its judgment on

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Footnote continued—

or if his preliminary order is subject to judicial review under the Administrative Procedure Act - or, indeed, if both a hearing and judicial review were required - the quick and efficacious remedy desired by Congress would be lost.

TDU *amicus* brief at 18.

32. *See* pp. 34-38, *supra*.

33. For a thorough analysis of the legislative history of Section 405 and the congressional intent not to foreclose an adequate hearing opportunity for employers before deprivation *see* ATA *amici* brief at 4-8.

34. Under the TDU scheme, when "the employer thumbs his nose at the Secretary," it gets its day in court as a defendant. TDU *amicus* brief at 17.

the merits for that of the Secretary. Section 405(e) only provides statutory authority for the district court to enforce a reinstatement order issued by the Secretary. The statute directs the Secretary, not the district court, to make the reasonable cause determination and issue the order.

Relatedly, the TDU interpretative scenario imports another corpus of litigation into the federal district courts in the absence of any signs of congressional intent: preliminary injunctive hearings as the regular mode of Section 405(c) reinstatement decisions instead of initial adjudication by DOL followed by judicial review, the scheme visible in the text of the law. 49 U.S.C. App. §2305(d). Moreover, the decisions of the Court throughout the development of prior hearing doctrine since *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), have tested the constitutionality of administrative procedures by the availability to the affected party of a meaningful hearing opportunity within the administrative scheme itself, and not by the general availability to it of a subsequent lawsuit in the courts as an effort to redress the administrative deprivation order.[35]

Finally, of course, the TDU argument was not available to the court below and could not have played any part in its deliberation and decision. Indeed, as mentioned, the TDU rationale contradicts the statutory position taken by the Secretary and submitted by him to the district court as an ingredient of the decision now on review. Un-

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35. Consequently, TDU's discussion of the injunctive relief criteria applied by the district courts in enforcement suits pursued by the National Labor Relations Board under "§10(j)" and "§10(l)" of the National Labor Relations Act is immaterial. 29 U.S.C. §160(j), (l). TDU *amicus* brief at 20-22. The constitutional question at hand is whether the employer receives a meaningful hearing opportunity before the issuance of an order and the commencement of judicial enforcement litigation.

derstandably this circumstance can result from the submission of *amicus* views necessarily for the first time in this Court. However, this particular argument diverges so dramatically from the range of reasoning advanced below that it has deprived the trial court of a realistic opportunity for its consideration.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPELLEE'S APPENDIX A

DOL Case #	Complainants	Date of Filing of Complaint	Date of Secretary's Preliminary Findings and Order	Number Days From Filing Complaint to Preliminary Findings	Result
1. 0-1650-84-503	Lanpher	01/12/84	04/18/84	97	Cause
2. 1-1270-83-01E	Holmes	02/04/83	10/17/83	255	Cause
3. 1-0120-83-1E	Guinen	06/21/83	10/11/83	112	Cause
4. 1-1270-83-02E	Farland	06/21/83	12/20/83	182	No Cause
5. 1-1270-84-501	Bertrand	11/15/83	09/28/84	318	No Cause
6. 2-6010-84-502	Hulslander	10/07/83	04/12/84	188	Cause
7. 3-6600-83-501	Sollenberger	09/15/83	10/22/84	403	No Cause
8. 3-0050-84-501	Bowyer	10/06/83	06/11/84	249	No Cause
9. 3-0050-84-502&6	Gipson	11/01/83	05/29/84	210	No Cause
10. 3-0050-84-505	Stack	03/28/84	06/01/84	65	No Cause
11. 3-0050-84-040&508	Harper	08/13/84	10/22/84	70	No Cause
12. 4-1220-83-01E	Abrams	05/23/83	11/04/83	165	No Cause
13. 4-0280-83-03E	Couch	07/08/83	10/20/83	104	No Cause
14. 4-0520-83-01E	Nix	07/08/83	10/20/83	104	Cause
15. 4-0280-83-091	Garrett	08/04/83	12/08/83	96	Cause
16. 4-3750-83-05E	Williams	09/23/83	05/22/84	242	No Cause
17. 4-1760-84-01E	Culver	10/03/83	02/03/84	123	No Cause
18. 4-0280-84-02E	Wiggins	10/05/83	01/30/84	117	No Cause
19. 4-3750-84-501	Hilton	11/04/83	01/26/84	83	No Cause
20. 4-3750-84-502	Hicks	01/06/84	08/08/84	215	Cause
21. 4-0280-84-503	Hufstetler	02/07/84	01/21/85	349	Cause
22. 4-0350-84-507	Lamb	03/26/84	05/15/84	50	No Cause
23. 5-0170-84-501	Kriescher	04/18/83	12/28/84	619	No Cause
24. 5-1260-83-001(405E)	Flener	06/08/83	08/23/84	442	No Cause
25. 5-1680-83-3(405E)	Smith	07/25/83	01/11/84	170	Cause
26. 5-1260-83-2(405E)	Carothers	08/19/83	08/23/84	369	No Cause
27. 5-4760-84-501	Jacobs	10/14/83	08/23/84	314	No Cause
28. 5-8120-84-501	Cady	10/17/83	02/17/84	122	No Cause
29. 5-3100-84-501	Schaff	10/28/83	08/08/84	285	No Cause
30. 5-1680-84-503	MacIntyre	11/30/83	08/02/84	246	No Cause
31. 5-6850-84-504	Cearlock	02/07/84	12/28/84	325	No Cause
32. 6-2320-84-501	Pilgrim	12/16/83	04/05/84	111	No Cause
33. 6-1730-84-509	Yingling	02/07/84	05/14/84	97	No Cause
34. 6-3550-84-503	Winkler	02/21/84	08/17/84	178	No Cause
35. 6-2320-84-009&502	Weise	02/27/84	08/10/84	165	No Cause
36. 6-1730-84-039&510	Anderson	03/02/84	04/30/84	59	No Cause
37. 6-1730-84-045&512	O'Conner	03/20/84	05/14/84	55	No Cause
38. 6-1730-84-064&514	Reinhart	05/02/84	08/07/84	97	No Cause
39. 6-1730-84-062&513	Thomas	05/07/84	07/26/84	80	No Cause
40. 7-5880-84-501	Wayman	09/09/83	05/17/84	251	No Cause
41. 7-4120-84-501	Nichols	12/27/83	11/30/84	339	No Cause
42. 7-2260-84-515	Dischler	07/30/84	11/05/84	97	No Cause
43. 8-0370-84-001E	Sandness	09/19/83	10/02/84	379	Cause
44. 9-0370-84-507	Rezac	05/09/84	12/07/84	212	No Cause
45. 9-1970-84-508	Kelly	07/05/84	12/07/84	155	No Cause

No. 85-1530

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
APPELLANTS

v.

ROADWAY EXPRESS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE APPELLANTS

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TABLE OF AUTHORITIES

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We showed in our opening brief that the temporary reinstatement remedy created in Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), does not violate appellee's due process rights. Nothing in appellee's answering brief refutes our position.

1. Before discussing appellee's arguments, we wish to advise the Court of two developments since the filing of our opening brief. First, on August 21, 1986, the Secretary issued a final order adopting the administrative law judge's finding that appellee discharged employee Jerry Hufstetler in retaliation for Hufstetler's safety-related activities. The Secretary directed the reinstatement of Hufstetler to his former position, awarded Hufstetler back pay, and ordered the restoration of Hufstetler's other employment benefits.[1] Appellee has filed a petition for

[1] We have lodged ten copies of the Secretary's decision with the Clerk of this Court.

review of the Secretary's decision in the United States Court of Appeals for the Eleventh Circuit pursuant to 49 U.S.C. App. 2305(d)(1). See *Roadway Express, Inc.* v. *Brock*, No. 86-8771.

Appellee's obligation to reinstate Hufstetler now flows from the Secretary's final order, not from the temporary reinstatement order, but the district court's injunction against the enforcement of the temporary reinstatement order should not be vacated as moot. In *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), this Court recognized an exception to the mootness doctrine for controversies that are "capable of repetition, yet evading review." The Court has explained that, in the absence of a class action, this exception may be invoked when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); see also *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603 (1982); *First National Bank* v. *Bellotti*, 435 U.S. 765, 774-775 (1978); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

Appellee is "one of the nation's largest over-the-road carriers" (J.A. 80); the Department of Labor informs us that the Secretary has issued findings in 28 Section 405 proceedings involving appellee.[2] There is thus a reasonable expectation that the controversy between appellee and the Secretary of Labor regarding the validity of a temporary reinstatement order will recur in connection with a future Section 405 complaint and that, as in the present case, the litigation will not be resolved prior to the issuance of the Secretary's final order. The present case accordingly is not moot.

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[2] Nineteen of these proceedings concerned a single employment practice.

A second development relating to this case is the issuance by the Secretary on November 21, 1986, of procedural regulations applicable to proceedings under Section 405 (see 51 Fed. Reg. 42091). These regulations, which are effective in 30 days and subject to revision upon the receipt of comments by interested persons, set forth the procedures governing the filing of a complaint, the Secretary's investigation, proceedings before the administrative law judge, and issuance of a final order by the Secretary. They essentially incorporate the relevant provisions of the statute and of the Secretary's published investigatory procedures relating to proceedings under Section 405.

2. On the merits, appellee and amici assert that the Court may avoid the constitutional issue in this case by construing Section 405 in a manner that provides appellee with the relief it seeks under the Due Process Clause. These proposed interpretations of Section 405 are plainly incompatible with both the plain statutory language and Congress's intent.

a. Appellee (Br. 13-15) and amici American Trucking Associations, Inc. (ATA) et al. (Br. 4-8) claim that this Court need not decide the constitutional issue presented in this case because Section 405 may be interpreted to require the Secretary to hold an evidentiary hearing before he issues a temporary reinstatement order. Nothing in the language of the statute or its legislative history indicates that Congress intended that result.

Section 405 spells out in considerable detail the procedural steps leading to the issuance of a temporary reinstatement order. The Secretary must notify the employer of the filing of the complaint, conduct an investigation, and inform both the complainant and the employer of his determination. If he finds "reasonable cause to believe that a violation [of Section 405] has occurred," the Secretary must issue a preliminary order

providing for the relief authorized under the statute. The employer may object to the preliminary order and request an on-the-record hearing, but the statute specifically provides that his objections "shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. App. 2305(c)(2)(A). The plain language of the statute thus requires reinstatement effective upon the issuance of the reasonable cause finding and prior to the evidentiary hearing.

The legislative history of Section 405 confirms this conclusion. Prior versions of what became Section 405 did not provide for temporary reinstatement of a discharged employee pending the completion of the evidentiary hearing. See, *e.g.*, Amendment No. 1440, § 409(c)(2)(A), to S. 3440, reprinted in 128 Cong. Rec. S14627 (daily ed. Dec. 14, 1982); S. 1390, 96th Cong., 1st Sess. § 109(c)(2)(A) (1979). The express provision for temporary reinstatement contained in the bill that was enacted into law makes clear that Congress intended that the employee would be reinstated as soon as the Secretary made his reasonable cause determination, so that the employee would be working while the evidentiary hearing was under way.[3] The only reason to interpret Section 405 in the manner suggested by appellee and these amici would be to avoid any possible constitutional infirmity, but since the Due Process Clause does not require a pre-reinstatement evidentiary hearing, there is no reason to consider that course here.

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[3] Amici ATA claim (Br. 6-7) that Congress did not understand that the statute provided for temporary reinstatement. This argument rests upon amici's speculation that Congress was unaware of the change in the language of the statute. That quite unlikely assumption – founded only upon the fact that the conference report refers to a "proposed order" and does not discuss the provision for temporary reinstatement – provides no grounds for ignoring the plain language of the statute.

b. Amicus Teamsters for a Democratic Union (TDU) offers its own imaginative statutory solution to the question presented in this case. It observes (Br. 18-22) that the Secretary's temporary reinstatement order may only be enforced through a proceeding in district court pursuant to Section 405(e), 49 U.S.C. App. (Supp. II) 2305(e), and asserts that this judicial proceeding provides the protections required by the Due Process Clause.

It is, of course, correct that a district court action under Section 405(e) is the vehicle for the enforcement of the Secretary's orders. But, as even appellee concedes (Br. 44-45), the district court action is not a forum for the relitigation of the Secretary's reasonable cause determination; Section 405(e) provides for a summary judicial proceeding. All the Secretary need do in order to obtain an injunction from the district court is establish that he issued an order and that the employer has not complied with the terms of that order. Section 405 states that where the employer does not timely request an administrative hearing "the preliminary order shall be deemed a final order which is not subject to judicial review" (49 U.S.C. App. 2305(c)(2)(A)); that provision would be meaningless if the employer could later dispute the merits of the Secretary's order in the Section 405(e) enforcement proceeding. See also 49 U.S.C. App. 2305(d); cf. *United States* v. *Howard Electric Co.*, No. 85-1144 (10th Cir. Aug. 4, 1986) (discussing summary nature of analogous enforcement proceeding under the Occupational Safety and Health Act).

The Section 405(e) proceeding retains its summary character when the Secretary seeks to enforce a preliminary order. Nothing in Section 405(e) indicates that the scope of the proceeding depends upon whether the Secretary seeks to enforce a final order or a preliminary

order.[4] Indeed, the scope of the proceeding must be the same in both situations because nothing in Section 405(e) authorizes the district court to review the correctness of the Secretary's findings. Substantive review of those findings by a district court would undercut Congress's decision to provide for judicial review in the courts of appeals. Cf. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468-469 (1984).[5]

3. Congress adopted the temporary reinstatement remedy at issue in this case because it concluded that when there is reasonable cause to believe that an employee was discharged in violation of Section 405, the employer rather than the employee should bear the interim financial burden pending a disposition on the merits. That conclusion, based on concern both for the employee and for highway safety, was eminently reasonable. Those concerns clearly outweigh the comparatively insignificant interest of the employer in such a case. In any event, under the standard announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), appellee was provided with all of the procedures required by the Constitution.

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[4] The provision that TDU cites (Br. 20-21) as analogous to Section 405(c) – 29 U.S.C. 160(j) – is considerably narrower than Section 405(c) because it only authorizes the district court to provide preliminary relief requested by the National Labor Relations Board and does not apply with respect to the enforcement of the Board's orders for permanent relief.

[5] TDU suggests (Br. 18) that the Secretary's preliminary reinstatement order might be subject to judicial review under the Administrative Procedure Act. But there is nothing novel about requiring a litigant to exhaust his administrative remedies before obtaining judicial review. See 5 U.S.C. 704 (the relevant substantive statute may classify preliminary agency action as nonfinal, and therefore not subject to judicial review). Even if judicial review were available, moreover, a proceeding in court would not provide appellee with the procedural protections that it seeks. Cf. *Goss* v. *Lopez*, 419 U.S. 565, 581-582 n.10 (1975). Interpreting the statute as authorizing judicial review therefore would not eliminate the need to address appellee's constitutional claims.

The weightiest interest involved in this case is the employee's right to be protected against even an interim burden from a retaliatory discharge. The employee's reason for wanting that protection is obvious, but Congress had an even stronger motive for providing it: protection of trucking company employees is important to highway safety. See Gov't Br. 30-36.[6] Congress concluded that placing the burden of a reasonably disputed discharge on the out-of-work employee would severely hamper its safety program. As one truck driver testified in congressional hearings on the subject of motor carrier safety, "[t]he promise of back pay years down the road just is not enough protection when your car has been repossessed, your mortgage foreclosed, and your marriage broken up in the meantime." *Commercial Motor Carrier Safety: Hearing Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong., 2d Sess. 35 (1980) (statement of Mel Packer).

The contrary interest asserted by appellee is its right – founded in the collective bargaining agreement – to terminate an employee.[7] Appellee does not contest the showing

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[6] Amici ATA suggest (Br. 5-6 n.4) that it is somehow inappropriate to rely upon the legislative history in ascertaining the purposes of Section 405 because the temporary reinstatement remedy was not present in the earlier versions of the statute. Even though this particular provision was not added until later, however, the relevant congressional purposes plainly were spelled out in connection with the earlier versions of the legislation.

[7] Appellee attempts (Br. 20 & n.16) to bolster its interest by asserting that "innocent" employees might be laid off as a result of a temporary reinstatement. Of course any such layoff would be required only because the employer has hired, but refuses to keep on the job, a person to replace the employee who, the Secretary has found reasonable cause to believe, was wrongfully discharged (see Gov't Br. 27-28 n.13). In any event, the possible impact of the reinstatement upon another employee is not relevant in ascertaining the scope of *appellee's* property interest.

in our opening brief (at 26-30) that this interest, quite apart from its being more than offset by the converse interest of the employee, deserves considerably less weight than the property interests at stake in this Court's other predeprivation due process cases. Appellee's interest is plainly not, for example, as significant as an employee's interest in continued employment or a welfare recipient's interest in continued benefits.[8]

The Secretary's procedures afford employers the fundamental requisites of due process—notice of the charges and an opportunity to respond (see Gov't Br. 19-26). This Court has found similar procedural protections sufficient

[8] Appellee argues (Br. 16-19) that the length of time between the temporary reinstatement of an employee and the final decision is relevant in assessing the weight of its property interest. As we discuss in our opening brief (at 30 n.14), the duration issue is a red herring here because the passage of time enlarges the employee's interest as well as the employer's and because—even as of this date—appellee has not reinstated the discharged employee. This Court's decision in *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), makes clear that as long as the government procedures provide a prompt post-deprivation remedy, a temporary deprivation of property may last for a reasonable period of time (slip op. 13). Section 405 expressly requires an "expeditiously conducted" hearing (49 U.S.C. App. 2305(c)(2)(A)) and therefore satisfies this threshold requirement. See also 51 Fed. Reg. 42094 (1986)—(provisions of new regulations imposing time limits for conclusion of hearing and issuance of decision by administrative law judge).

Appellee argues (Br. 18-19) that the post-reinstatement hearing will not be expeditious, citing "[t]he nature of the factual questions at issue" and the fact that the Secretary's final decision may not be issued until 120 days after the ALJ issues his preliminary decision. But the Court in *Loudermill* rejected a challenge to a six-month delay between the temporary deprivation of property and the conclusion of the post-deprivation hearing (slip op. 13 & nn.11, 12). And appellee's reference to the nature of the issues merely undercuts its contention (Br. 34-41) that a pre-reinstatement hearing could be completed so quickly that it would not delay the temporary reinstatement of a discharged employee.

to satisfy due process in situations in which the balance of the government and private interests was far more favorable to the party being deprived of a property interest. *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 8-9, 12; Gov't Br. 19-25.

Appellee's challenges to the adequacy of these procedural protections are discussed in detail in our opening brief (at 19-26, 38-47); we address only two points here. First, appellee asserts (Br. 34-41) that the additional procedural requirements for which it contends need not delay the temporary reinstatement of a discharged employee and, therefore, would not thwart the interests of the employee and the government in timely reinstatement. Appellee suggests that the Secretary could perform a speedier investigation and use the time saved on the investigation to conduct a pre-reinstatement hearing.

But there is no reason to believe that the Secretary has devised a needlessly complex procedure for conducting Section 405 investigations. The Secretary has balanced the need for a full, accurate investigation—mindful of the consequences for employers of the issuance of a reasonable cause finding—against Congress's desire for expeditious reinstatement of improperly discharged employees, and devised a system that in his view properly accommodates those values. The Secretary has taken the logical approach of conducting a careful investigation so as to ensure that his reasonable cause finding rests on solid ground.[9]

[9] Appellee intimates that the average length of the Secretary's investigation undercuts our assertion that there is a significant interest in expeditious reinstatement of wrongfully discharged employees. But appellee's statistics regarding the time period between the filing of the complaint and the issuance of a preliminary order are somewhat incomplete. The Department of Labor informs us that data for the first 10 months of this year indicate that the average investigation lasted 102 days (see App., *infra*, 1a-2a). Thus, as the Secretary has gained experience in administering Section 405, the average length of an in-

The more cursory investigations proposed by appellee would inevitably lessen the accuracy of the investigatory process. Moreover, the procedure proposed by appellee would make it easier for employers to prevail at the hearing stage. The employer's position would be fully represented at the hearing by the employer's own representatives; the employee, who is more likely to depend upon the Labor Department investigator to present his side of the story, might well be harmed by a less complete investigation.[10] Thus, the plan put forward by appellee is likely to lead to more favorable outcomes for employers at the expense of the statutory goal of obtaining the reinstatement of illegally discharged employees. If, on the other hand, the Secretary retains the present procedures for investigations, the pre-reinstatement hearing would lengthen the time between the filing of a complaint and the temporary reinstatement of the employee.[11]

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vestigation has steadily decreased from an average of six to seven months in 1983, to approximately four and one-half months in 1984 and 1985, to a little more than three months in the current year.

[10] Appellee characterizes the procedure it proposes as something less than a full evidentiary hearing (see Br. 34), but—like the procedure imposed by the district court (see J.S. App. 8a-9a)—the procedure advocated by appellee contains all of the elements of an evidentiary hearing identified by this Court in *Goldberg* v. *Kelly*, 397 U.S. 254, 267-271 (1970). Moreover, the hearing proposed by appellee promises to be a time-consuming process. Not only would the investigator have to prepare witnesses to testify, but the employer would have a greater opportunity to obstruct the proceedings by, for example, prolonged cross-examination or efforts to introduce extraneous witnesses.

[11] Appellee cites (Br. 35-36) a variety of other statutes administered by the Secretary in support of its proposal for a pre-reinstatement evidentiary hearing and argues that these statutes support its approach. But, as appellee itself explains (*id.* at 36 n.26), these statutes are not relevant here because none of them provides for a temporary reinstatement remedy; they authorize only permanent relief. It therefore is not surprising that these statutes all require an evidentiary hearing prior to reinstatement. Congress's judgment that a preliminary remedy was required here plainly mandates a different procedural approach.

Second, appellee contends (Br. 27-31) that the Secretary's procedures are defective because the decision whether to issue a temporary reinstatement order is not made by an impartial decisionmaker. But appellee's entire argument rests upon the wholly erroneous assumption that the Labor Department investigator is the decisionmaker. In fact, the Secretary has delegated the authority to make these determinations to the regional administrators of the Occupational Safety and Health Administration (see 48 Fed. Reg. 35736 (1983)); appellee does not—and cannot—assert that these officials are in any way biased against employers.[12]

For the foregoing reason, and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor
Department of Labor

NOVEMBER 1986

[12] Appellee also claims (Br. 23-27) that the Due Process Clause requires the government to conduct a predeprivation evidentiary hearing in virtually every situation in which the relevant factual issue may turn upon subjective factors such as a credibility determination. As we show in our opening brief (at 23 n.12, 41-45), that claim is simply incorrect; this Court generally has not required an evidentiary hearing in such circumstances. Here, where appellee's property interest is relatively insignificant and the employer can effectively convey its side of the story through other procedures, such as presentation of its own witnesses and arguments by its attorneys or other representatives, the Constitution does not require a pre-deprivation evidentiary hearing.

SECTION 405 INVESTIGATIONS CONDUCTED IN 1986

Case Number	Date Complaint Filed	Date Findings Issued	Number Of Days	Results*
6-3280-86-502	3/19/86	4/24/86	36	N
7-3620-86-506	4/14/86	7/17/86	93	N
7-3620-86-503	2/21/86	5/19/86	87	N
4-2950-86-503	1/23/86	7/17/86	175	N
6-2320-86-503	4/23/86	7/11/86	79	N
4-0520-86-501	11/3/85	2/11/86	99	N
2-6010-85-503	2/6/86	3/21/86	43	M
6-1730-86-502	4/18/86	7/8/86	81	WD
4-0350-86-506	5/16/86	7/11/86	56	N
5-6850-86-504	12/9/85	4/16/86	128	N
8-0600-86-504	1/3/86	6/20/86	168	S
4-0280-86-503	10/28/85	1/29/86	93	M
9-3290-86-501	10/7/85	2/14/86	130	N
4-1220-86-506	4/25/86	8/1/86	97	N
7-2260-86-504	3/20/86	6/24/86	96	N
6-0150-86-505	6/19/86	9/18/86	91	N
4-2950-86-505	3/24/86	4/30/86	37	N
6-4140-86-504	3/18/86	5/14/86	44	N
5-2210-86-506	1/24/86	6/16/86	143	N
6-3550-86-501	3/7/86	4/23/86	47	N
3-3500-85-502	12/11/85	4/28/86	138	N
5-4760-86-501	1/27/86	5/12/86	105	NA
7-3620-86-501	11/26/85	3/11/86	105	N
3-0050-86-502	10/21/85	4/9/86	169	N
6-1730-86-501	11/15/85	1/29/86	75	N
3-0050-86-507	2/3/86	6/11/86	128	N
4-1760-86-504	2/5/86	3/4/86	27	S
4-0280-86-506	2/26/86	7/14/86	138	N
6-4140-86-505	4/1/86	8/13/86	135	M
8-1700-86-501	4/10/86	7/14/86	125	S
2-0050-86-501	12/2/85	6/20/86	200	M

Case Number	Date Complaint Filed	Date Findings Issued	Number Of Days	Results*
5-0460-85-503	9/3/85	3/15/86	193	N
6-3280-86-503	7/21/86	8/11/86	21	N
8-0060-86-503	12/9/85	4/25/86	137	N
7-2260-86-503	2/19/86	4/30/86	70	WD
7-3620-86-505	3/13/86	5/1/86	49	WD
4-0280-86-505	2/12/86	4/10/86	56	S
4-0290-86-505	2/3/86	8/1/86	179	N

*KEY:
N = Complaint found to be without merit
M = Complaint found to have merit
S = Case settled
WD = Complaint withdrawn by complainant
N/A = Not available.

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(3)

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Appellants,

v.

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Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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30 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

Page

LEGISLATIVE MATERIALS AND RULES

Statutes:

Legislative History

Page

Rules:

OTHER AUTHORITIES:

Page

Page

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THE INTEREST OF *AMICUS CURIAE*

Teamsters for a Democratic Union ("TDU") is a voluntary unincorporated association of thousands of rank-and-file Teamsters members seeking to reform and democratize their union, and, in so doing, to make it more responsive to their needs. As is true for the International Brotherhood of Teamsters itself, the core of the membership of TDU — and particularly of its predecessor organization, PROD (the Professional Drivers Council for Safety and Health) — is employed in the trucking industry.

One of the significant shortcomings of the Teamsters Union has been its lack of commitment to occupational safety and health in the trucking industry, a matter of concern not only to its members, but also to the general public who are all too often victims in accidents involving unsafe trucks. Although most trucking contracts contain strong safety clauses, many Teamster members have found not only that their union is uninterested in enforcing these provisions, but also that those members who invoke the contractual protections are not supported by the union in the "joint grievance committee" system, which is used instead of neutral arbitration in the Teamsters Union. Moreover, it was not until several years after the formation of PROD that the Teamsters even created a Safety Department and hired a Safety Director.

Thus, a substantial part of TDU's and PROD's efforts have been directed to obtaining government intervention in support of truck safety, particularly the passage of meaningful whistleblower protections. These were ultimately enacted as section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305, whose enforcement procedures are subjected to constitutional attack in this case. TDU's members, staff, and counsel all testified at the hearings on the whistleblower protections and worked closely with members of Congress during the legislative process that led to the enactment of the law. *Amicus curiae* files this brief, with the consent of both sides, both to defend the product of its intensive effort, and to justify one of the most important legal protections which its members enjoy on the job.

SUMMARY OF ARGUMENT

The enforcement procedures in section 405 of the Surface Transportation Assistance Act are a constitutional response to an extremely grave problem. Trucking accidents cause a large number of deaths and injuries, not only to the truck drivers themselves, but also to the general public with whom they share the highways. Yet until section 405 was enacted, truck drivers who refused to drive unsafe trucks did not enjoy any legal protection against discharge, and therefore were often unwilling to risk their livelihoods in order to prevent unsafe practices. Congress decided to provide simple and effective procedures to protect such drivers, including preliminary reinstatement orders, in order to recruit them as the front line in preventing safety violations.

Unlike the Solicitor General, TDU does not argue that these preliminary orders satisfy due process because of the quality of the investigations made by the Secretary of Labor before he issues them. Rather, we argue that the due process cases invoked by the court below have no application because the preliminary orders under section 405 are not self-enforcing. If such orders are not voluntarily respected by the employer, the Secretary must obtain a court order to enforce them.

The Secretary's decision to seek judicial enforcement without first holding an evidentiary hearing no more violates due process than the decision of the National Labor Relations Board to seek a preliminary injunction pending an administrative hearing on an unfair labor practice complaint. In such cases, the focus of the judicial inquiry should be whether there are facts which create a reasonable basis for believing that the statute was violated; the procedures used by the Secretary in deciding to seek

preliminary reinstatement simply have no bearing on that issue and hence are not subject to due process challenge.

The alternative suggestion by the court below that the right to preliminary reinstatement is undermined by the fact that a worker's discharge has been upheld by a union-employer grievance committee is also without basis. The fact that a discharge is proper under a collective bargaining agreement has no bearing on the employee's statutory rights. This Court has reached the same conclusion about other worker-protection statutes, and there is no reason why section 405 should be treated any differently.

ARGUMENT

THE PRELIMINARY REINSTATEMENT PROCEDURE IN SECTION 405 IS CONSTITUTIONAL.

A. The Reasons for the Enactment of Section 405.

Before addressing Roadway's due process objections to section 405, it is important to consider the reasons why Congress chose to provide truck drivers with an expeditious reinstatement remedy. The statute was the product of several years of hearings and debates about the problems of truck safety, as it affects both the workers employed in the trucking industry and the general public which must drive on the roads with heavy trucks. Congress was regaled with data about truck safety problems during a series of hearings in 1978 to 1980.[1] Senator

[1] *Truck Safety Act of 1978,* Hearing Before the Senate Committee on Commerce, Science, and Transportation, 95th Cong., 2d Sess., No. 95-132 (1978) ("1978 Safety Hearing"); *Truck Safety Act,* Hearings Before the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess., No. 96-55 (1979) ("1979 Safety Hearings"); *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of Its Regulations,* Hearings Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 96th Cong., 2d Sess., No., No. 96-46, Part 3 (1980) ("1980 Current Conditions Hearings"); *Commercial Motor Carrier Safety,* Hearing Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 96th Cong., 2d Sess., No. 96-57 (1980) ("1980 Safety Hearing").

Charles Percy introduced a truck safety bill, S. 1390, which passed the Senate, 126 Cong. Rec. S1661 (daily ed., February 20, 1980), but was never brought to a vote in the House. The bill's provisions were then incorporated into section 405 of the Surface Transportation Assistance Act of 1982, 128 Cong. Rec. S14018-14019 (daily ed., December 7, 1982), which passed as Pub. L. No. 97-424, 96 Stat. 2157-2158 (1983).

Truck driving is an extremely dangerous profession. Driving long hours, at high speeds, in vehicles weighing up to 80,000 pounds and measuring up to 90 feet in length, would be a high risk occupation for both the driver and other motorists, even if the vehicles were in good condition. The risk is compounded, however, by the fact that the mechanical condition of commercial trucks is often well below par. According to the Bureau of Motor Carrier Safety, in 1980 some 2.5 violations were found for each safety inspection, and one out of every two inspections produced a violation serious enough to require that the vehicle be taken out of service. BMCS, *1980/81 Roadside Vehicle Inspection Report* 17 (1982). Therefore, it is not surprising that, although coal mining has been considered the most dangerous job in the United States, the transportation industry produced almost twice as many fatalities in

1980.[2] Indeed, in that year trucking and warehousing produced more per capita injuries leading to the loss of workdays than any industry except the manufacturing of lumber and wood products. Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States, 1980* 30-32 (1982). *See also Baker, et al., Fatal Occupational Injuries,* 248 J. Am. Med. Ass'n 692 (1982) (Maryland study shows that in 1978 more fatalities were caused by road vehicles than by any other cause; half of this category were truck drivers killed in crashes).

Although drivers themselves obviously have a strong interest in reducing this carnage, the general public interest is even stronger. There are some 44 accidents every hour involving large trucks alone. In 1981, this produced 5,779 fatalities, of which only 1,131 were occupants of the truck (mostly drivers). Eicher, Robertson, and Toth, *Large-Truck Accident Causation,* xi I-1 (NHTSA 1982). Indeed, Congress noted that when an accident involves both trucks and cars, 97% of the deaths occur to occupants of cars. 126 Cong. Rec. S1652 (daily ed., February 20, 1980).

Despite the heavy costs when accidents occur, trucking companies have strong incentives to send unsafe trucks on the road, and to coerce truckers to drive them. First, the maintenance and repair of tractors and trailers are expensive. Moreover, when trucks are out of service, the company is not only losing profits that could be made on the use of these assets, but also paying the drivers to wait for their vehicles to be returned to proper condition. Particularly in light of the intense competition fostered by the deregulation of the trucking industry, these economic factors encourage companies to pressure drivers to operate marginally safe vehicles. *See* 1980 Safety Hearing, at 785-86 n.2 (trucking company safety supervisor quoted in *Cincinnati Enquirer* as saying his company "is not in the maintenance business. It is in the trucking business."); Baker, *Safety Implications of Structural Changes in the U.S. Motor Carrier Industry: A Discussion Paper* 17 (AAA Foundation for Traffic Safety, 1985) (given cash shortage, companies are deferring both maintenance and purchase of new trucks, leading to aging fleet with more safety problems).

[2]The fatality figures involve all forms of mining and mineral extraction, and all forms of transportation and utilities. Coal mining and trucking comprise the most dangerous portion of each category.

Congress also found that the existing system of safety enforcement was completely inadequate. The government could file civil suits only for record-keeping violations; safety regulations had to be enforced through the criminal law, which covered only "knowing and willful" violations. However, the Justice Department was unwilling to become involved in such matters, which it regarded as "traffic court" cases. As a result, enforcement actions were rarely brought. 1978 Safety Hearing, at 133.

Moreover, the task was too large for the limited resources available. With some three million heavy trucks, and a million professional drivers, one or two hundred federal safety inspectors cannot possibly examine enough vehicles, frequently enough, to discover or deter safety violations. 1979 Safety Hearings, at 68, 161; Senate Committee Report No. 96-547, 96th Cong., 1st Sess. 3-4 (1979). The drivers themselves were considered to be in the best position to stop violations by refusing to take unsafe vehicles on the road; but, as employees, they were subject to strong pressures to ignore violations. Moreover, there

was inadequate legal protection against discharge for reporting them or for refusing unsafe work. Employee representatives, however, assured Congress that workers would prefer not to use unsafe equipment, if they could be sure that their jobs would be protected by a swift and sure remedy. 1980 Safety Hearing, at 47, 69-70. The whistleblower provisions ultimately adopted as section 405 were thus intended to recruit the drivers themselves for the enforcement of Federal safety standards. 1978 Safety Hearing, at 135; Senate Committee Report at 4; 126 Cong. Rec. S1654 (daily ed., February 20, 1980).

But Congress also decided that, in order to enlist drivers to help enforce federal safety standards, it would not be sufficient merely to provide a procedure to enable workers to obtain reinstatement after years of litigation. Rather, it determined that only an unusually expeditious remedy could provide sufficient reassurances to induce workers to put their jobs on the line. It was aware that an employer may well decide that it is economically rational to fire employees who exercise their statutory rights as a deterrent to other workers' exercise of their rights, even if it eventually has to provide reinstatement with back pay (less the worker's interim earnings) years later, following lengthy administrative procedures and judicial reviews. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1793 (1983). Moreover, while they are awaiting reinstatement, workers may find their economic positions and their marriages dissolving, as they default on mortgages or auto loans, are unable to support their families, and incur other losses which are not compensated by eventual reinstatement, back pay, or even damages. If workers believe that they must pay a substantial penalty for exercising their rights, offset only by a possible reinstatement with

back pay years later, they will be much less likely to take the risk of helping to enforce the federal truck safety rules. 1980 Safety Hearing, at 35. Indeed, as one local union officer bluntly told Congress, immediate implementation of reinstatement is essential because "that is the only way you will have people stand up to [their companies]." *Id.* at 47.

Moreover, studies have shown that reinstatement is effective only if it is offered within a short period following the discharge. Weiler, *supra,* 96 Harv. L. Rev. at 1791-93. As time passes, workers are less likely to accept an offer of reinstatement, *The Aspin Study: A Summary of the Findings, reprinted in* Atleson, *et al., Collective Bargaining in Private Employment* 313-316 (1978), and even those who return to their positions are less likely to last for more than a year or so. Chaney, *The Reinstatement Remedy Revisited,* 32 Lab. L.J. 357 (1981). Thus, the employer who is able to delay reinstatement for a substantial period of time can effectively communicate to the rest of its workers that they would be ill-advised to assert their rights under section 405. In consequence, Congress stressed the importance of an expeditious remedy, maintaining whistleblowers' positions on the job pending the administrative hearing, in order to stop employers from violating truck safety rules. S. Report No. 96-547, *supra,* at 6, 18.

As enacted, section 405 had the approval not only of employee groups but also of the trucking companies. 126 Cong. Rec. S1653 (daily ed., February 20, 1980). It provided an administrative remedy in the Labor Department for employees who were discharged for refusing unsafe trucks or reporting violations. Section 405(c)(1). The Secretary is required to investigate and report his findings within 60 days. Section 405(c)(2)(A). If he finds that there is "reasonable cause" to believe the discharge was retaliatory, he must order reinstatement, back pay, and other

compensatory damages, *id.;* if the worker is not reinstated, the Secretary must seek an injunction in district court. Section 405(e).[3]

If the employer does not file objections to the reinstatement order, it becomes final without the availability of judicial review. Section 405(c)(2)(A). If the employer does file objections, it is entitled to a prompt hearing, but the reinstatement is not stayed pending the hearing. *Id.* Finally, the employer may petition the court of appeals for review of the order issued following the administrative hearing. Section 405(d)(1).

Thus, Congress' response was to create an administrative mechanism, with officials of the Labor Department conducting the necessary investigation and trying the case if it goes to a hearing. The investigation was to be completed within sixty days so that employees who appear to have lost their jobs for refusing to drive unsafe trucks can obtain reinstatement before it is too late, or too expensive, or both.

B. The Right to Prelimiary Reinstatement Is Not Affected by the Union Grievance Procedure.

Both the district court opinions and the employer's motion to affirm placed considerable reliance on the fact that the company had obtained a ruling under the contractual grievance procedure that the discharge in this case did not

[3]If the Secretary does not find such reasonable cause to believe that a violation has occurred, the affected employee may obtain an administrative hearing on his complaint, although presumably he is not entitled to reinstatement unless and until the Administrative Law Judge rules in his favor. Section 405(c)(2)(A).

violate the safety clauses in the collective bargaining agreement. They argue both that the Secretary's preliminary order of reinstatement would itself violate the contract and upset the "arbitration" decision, Pet. App. 7a; Motion to Affirm, at 8 n.6, and that the grievance procedure provides more due process than the Secretary's investigation because both sides (*i.e.*, the union and the employer) have an equal opportunity to litigate. Pet. App. 16a. As we now demonstrate, neither argument is correct, and indeed acceptance of this view would be contrary to Congress' determination that pre-existing remedies for retaliatory discharges were inadequate.

First, as the district court apparently recognized, Pet. App. 16a, the decisions of this Court do not permit union grievance and arbitration procedures under the collective bargaining agreement to bar subsequent litigation of employee rights under worker-protection statutes. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight Systm.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch,* 466 U.S. 124 (1984); *Chicago Teachers Union v. Hudson,* 106 S. Ct. 1066, 1077 n.21 (1986). The reasoning of those cases fully applies here. As in those cases, Congress intended that individual workers would be able to file complaints under section 405 and obtain a hearing on their claims of retaliatory discharge, without regard to prior arbitration proceedings under a collective bargaining agreement. Although the statutes involved in those cases provide a right to sue in district court, there is no reason why the statutory right under section 405 to proceed before an administrative agency should be treated differently.

Another reason given in those cases for allowing the statutory proceeding to go forward is that the worker does not have the right to direct the presentation of his own

case in the grievance proceeding, but must accept whatever representation and whatever strategic choices the union chooses. That rationale is also fully applicable here. Additionally, those cases refuse to allow a prior grievance decision to control the outcome of the statutory claim because union grievance procedures are inadequate to resolve the statutory questions, even though the parties have agreed to use them to resolve contractual questions. Again, that rationale fully applies to federal claims that the worker was fired for filing a safety complaint, section 405(a), or for a refusal to work which was reasonably founded on a belief that federal safety rules were being violated or that public safety was endangered. Section 405(b).

Congress was advised of the existence of contractual grievance procedures in the interstate trucking industry, which has been highly unionized, mostly under Teamster contracts. But workers and their representatives complained that these procedures provided inadequate protection for the right to refuse unsafe work, 1978 Safety Hearing, at 135; 1980 Current Conditions Hearings, at 782-783; 1980 Safety Hearing, at 35-36, while the associations of trucking employers argued that union grievance procedures provided sufficient protection that a statute was unnecessary. 1978 Safety Hearing, at 106; 1979 Safety Hearings, at 133. Congress' decision to enact section 405 in the face of these sharply contrasting arguments surely represents a decision that contractual procedures were not an adequate substitute for rights and procedures under public law. Indeed, immediately preceding passage of the Act, a colloquy between Senators Percy and Danforth clarified Congress' intent that the remedy under section 405 was to be in addition to any pre-existing remedies, such as under union contracts. 128 Cong. Rec. S15611 (daily ed., December 19, 1982). Therefore, if the employer

must respond in an administrative proceeding after winning the contractual one, that is simply a consequence of the fact that Congress has chosen to provide this additional right.

There is another reason, applicable principally to Teamster contracts, why the prior grievance proceeding here is of no significance to the statutory claim. Most union contracts require a series of meetings between employer and union leaders, at increasingly higher levels (usually called "steps"), at which attempts are made to resolve the grievance informally; if no agreement can be reached at the highest level of informal meeting, then the union has to decide whether to invoke arbitration before a neutral person selected by both sides. Elkouri & Elkouri, *How Arbitration Works* 165-166 (4th ed. 1985). Under the Teamster procedure, by contrast, both the successive steps and the arbitration are replaced by "joint grievance committees," composed of an equal number of management and union representatives. In these circumstances, whenever an employee's grievance is "denied," it is because at least one union representative has voted with management. If the committee deadlocks, the grievance is referred to the next higher level. And if the National Grievance Committee deadlocks, the procedure culminates, not in arbitration by a neutral, but in the right of the union to strike to enforce its views, a right which is very seldom invoked. Consequently, the joint committee is most closely analogous, not to an adjudicatory body which applies contractual rights to particular facts, but rather to a sytem of on-going negotiations which forces the parties to reach an agreement about how they would like to have each particular case handled. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 837 (1973).

Moreover, the procedure followed by the joint committees does not inspire confidence in its fairness or in the accuracy of its decisions. As detailed by Professor Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication,* 37 Proceedings of the National Academy of Arbitrators 130 (1984), and by Professors Azoff and James before him, Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA,* 47 Tul. L. Rev. 325 (1973); James & James, *Hoffa and the Teamsters: A Study in Union Power* 167-185 (1965), *ex parte* contacts between the parties and the committee members are the "expected norm." Azoff, 47 Tul L. Rev. at 361. Thus, the union representatives who serve as advocates at the committee hearings can tell the union representatives who sit in judgment which grievances they really want to win, and inferentially which they are willing to see traded off. "Hearings" normally consist of each side making a statement of its position, with little or no testimoy or cross-examination, which permits a grievance committee to consider up to 30 cases in a single day, at a rate of 15 minutes per case. Summers, 37 NAA Proceedings at 134-138.[4] The committee decisions are usually stated in a single word, "denied" or "sustained," and include no rationale, so that it is easy to engage in horse-trading without any accountability. And, in fact, the union leadership does use the joint committee process to punish its enemies and reward its friends, all with the pretense of a fair hearing. *E.g.,* James & James, *supra;* Azoff, 47 Tul L. Rev. at 328-329; Summers, NAA Proceedings at 140-143.

[4]If a grievant insists upon presenting witnesses, or upon testifying himself, TDU has found that he will often be permitted to do so. Unfortunately, the real message which is presented by such a departure from normal procedure may be that the grievant does not trust the union to represent him, and that the union would probably not object to losing the grievance.

There is nothing intrinsically improper about this procedure as a means of resolving disputes under a contract, because a union must be free to sift out grievances which are frivolous, as well as to decide which individual or group claims are not deemed worth the expenditure of collective resources. *Humphrey v. Moore,* 375 U.S. 335, 349 (1964). And insofar as the procedure resolves claims that the contract has been violated, the Court has held that its results are entitled to as much finality between the parties as if the union had dropped the grievance short of arbitration, or gone to arbitration and lost. *General Drivers v. Riss & Co.,* 372 U.S. 517 (1963).[5] But the fact that the parties have decided to use this cheap and summary means for settlement of contract disputes does not entitle the employer either to assert that favorable decisons are a reason to reject employee claims that their statutory rights have been violated or to insist that either the Secretary or the courts give such decisions any weight in their consideration of whether there is reasonable cause to believe that a worker was discharged for refusing to drive an unsafe truck.

C. The Procedure for Preliminary Reinstatement Fully Comports With the Requirements of Due Process.

In deciding whether preliminary reinstatement proceedings under section 405 violate due process, it is first necessary to decide how that section operates in light of Congress' desire to ensure a speedy procedure for obtain-

[5]TDU believes that the decisions of the union representatives on the grievance committee should be open to examination pursuant to the duty of fair representation, much as the decision of a union business agent not to go to arbitration may be reviewed in a proper case. That issue, however, is not presented in this case.

ing reinstatement and the need for fairness to the employer who is subject to a reinstatement order. And in doing so, the Court should recognize that experience under other regulatory schemes providing for reinstatement of workers, such as the National Labor Relations Act, indicates that employers will not roll over and play dead when ordered to provide reinstatement. Rather, as discussed *supra* at 8-9, they will seek every opportunity to retain the coercive advantages which encourage retaliatory discharges in the first place; accordingly, they use every available means to delay the actual reinstatement as long as possible. The Secretary's construction of the statute is apparently based on his belief that employers will resist reinstatement to the hilt, and TDU's experience fully supports that belief.

The Secretary's solution to the problem of employer recalcitrance is to accept the district court's characterization of his investigation as a quasi-judicial determination of the basis for the discharge, although he then argues that the fairness of his investigatory procedure meets the standards of due process. He also construes section 405 so that, once an order is entered, it will be automatically enforced by the district court pursuant to section 405(e), without any review of the basis for the order. He believes that, even if he is ultimately required to conduct an evidentiary hearing and compile an informal record on which his quasi-adjudication will be based, he will still be entitled to automatic enforcement under section 405(e). The standard of automatic enforcement, in which the only question is whether the employer has complied with the order, would plainly have the effect of discouraging employer noncompliance, but it would require the due process charge to be defended solely on the basis of the Secretary's investigation.

Under this approach, the Secretary argues that his investigation satisfies the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). His papers seek to apply or distinguish a series of cases in which this Court has enumerated the due process requirements which apply to such government actions as the termination of welfare benefits, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); the revocation of a license, *e.g.*, *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977); discharge from government employment, *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985), or removal from public school. *Goss v. Lopez*, 419 U.S. 565 (1975).

However, the Secretary's preliminary orders under section 405 are fundamentally different from each of these government actions in one sense that makes the cases debated by the parties largely irrelevant. Thus, the discharge of a government employee or the revocation of a license is a self-executing act; the administrative decision itself deprives the private party of a valuable right or benefit. Under section 405, by contrast, the Secretary's preliminary order has no direct effect by itself; if the employer thumbs his nose at the Secretary, the Secretary must go to court in order to seek preliminary reinstatement for the discharged worker. But under the Secretary's view of section 405, the court would simply rubber stamp the administrative order, and hence in that sense his administrative ruling would be the functional equivalent of a self-executing reinstatement order which would have to meet the tests of due process on its own.[6]

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[6]It makes no difference that this preliminary order becomes final, and immune from judicial review, unless the employer files an objection and requests a hearing. Section 405(c)(2)(A). The due process clause scarcely prohibits the imposition of a minimal burden of requesting a hearing in order to avoid waiver of an evidentiary hearing and to maintain a right to judicial review.

Given TDU's desire to achieve the most expeditious possible reinstatement remedy, the Secretary's position is certainly seductive. We offer an alternative construction of the statute, however, because we do not share the Secretary's confidence that section 405 can be construed in that way and still pass due process muster. Our concern is that, if the Secretary's finding of "reasonable cause" is quasi-adjudicatory, he will not be able both to satisfy due process *and* to avoid judicial review under Administrative Procedure Act standards in a section 405(e) action. Indeed, although Congress has provided that orders which could have been reviewed under section 405 (*i.e.*, in the court of appeals) may not otherwise be reviewed in any other proceeding (such as in district court), section 405(d)(2), and that preliminary orders are not subject to judicial review if the employer files no objections, section 405(c)(2)(A), there is no express provision either permitting or precluding review of preliminary reinstatement orders when there are objections filed. Accordingly, we entertain serious doubts that the Court would decide, as a matter of statutory construction, that there is "clear and convincing evidence" that Congress intended to deny any judicial review of the basis for the preliminary order. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-141 (1967).

But if the Secretary must conduct an evidentiary hearing, however informal, in order to satisfy due process standards, or if his preliminary order is subject to judicial review under the Administrative Procedure Act — or, indeed, if both a hearing and judicial review were required — the quick and efficacious remedy desired by Congress would be lost. Thus, TDU suggests an alternate construction of the statute, pursuant to which the Secretary's investigation and findings under section 405(c)(2)(A) are unreviewable because they are simply a prosecutorial decision to institute a preliminary injunction action under section 405(e). In that event, it is in the courts that the employer would receive the process that is due.

Under this analysis of the statute, the only due process issue would be whether failure to grant employers a full evidentiary hearing in the course of the judicial preliminary injunction proceeding is unconstitutional under these circumstances. In our view, it was entirely proper for Congress to decide that an employer which seeks to discharge an individual who has made a safety complaint must maintain the pre-discharge status quo pending a prompt administrative hearing, once a neutral government official has concluded, after an investigation, that there is reasonable cause to believe that the worker was discharged because of the safety protest and some judicial review of the matter is available. *Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950); *cf. Fuentes v. Shevin,* 407 U.S. 67, 93 (1972).

Nor is there any novelty in a regulatory scheme which forbids business or other commercial interests from exercising their economic power to the disadvantage of individuals, pending an administrative hearing to determine whether the individuals' rights have been violated. Thus, in many states, landlords may not use self-help to evict tenants who, they believe, have violated the lease or overstayed their terms; rather, they must seek a judicial hearing first to determine whether the tenants are entitled to remain. *Restatement (Second) of Property* § 14.2 (1977); Uniform Residential Landlord & Tenant Act, § 4.207. Similarly, many states deny a secured creditor the right to repossess property over a debtor's objection, even if the debtor has defaulted on the loan, pending an expedited proceeding to determine whether there has been a default warranting forfeiture of the property. White and

Summers, *Handbook of the Law of the Uniform Commercial Code* § 26-6 (2d ed. 1980). And Congress has permitted the federal government to keep goods off the market by seizing them, pending completion of proceedings to determine whether the public is in fact endangered or misled by their labeling. *See Ewing v. Mytinger & Casselberry, supra.* By the same token, in section 405, Congress limited the right of trucking employers to use economic self-help by firing employees pending an administrative hearing, at least where the Secretary of Labor has determined, after an extensive investigation, that there is reasonable cause to believe that the discharge was motivated by the worker's exercise of his rights and there is a limited right to defend in court. This legislative scheme is no more offensive to due process than the procedures for resolving landlord-tenant, debtor-creditor, or food and drug disputes.

The remaining question is, what standard the district courts should apply when deciding whether to grant the preliminary injunction requiring reinstatement, pending the administrative hearing on any timely objection to reinstatement. The statute does not specify any standard, but we submit that Congress' objective of providing a quick and effective remedy would best be served by borrowing the standard applied by the district courts in the analogous situation under the National Labor Relations Act. Thus, when the NLRB's General Counsel finds reasonable cause to believe that an unfair labor practice has been committed, she may seek a temporary injunction under section 10(j) if she concludes that the remedies available from the Board after a full hearing will not adequately redress the harms caused by the unfair practice. If the violation involves certain forms of secondary boycott or recognitional picketing, section 10(l), not section 10(j), applies.

In considering such requests for preliminary relief, the courts neither inquire into the process by which the General Counsel carried out her investigation, nor conduct a *de novo* examination of the facts of the case. Rather, if there are disputed issues of fact, they defer to the General Counsel's version of the facts. Morris, *The Developing Labor Law,* 1640, 1649 (1983). Even disputes about the applicable law are resolved in favor of preliminary relief, unless the General Counsel's legal position is clearly wrong. *Id.* at 1641. Under section 10(l), which, like section 405 in this case, makes it mandatory rather than discretionary to seek preliminary relief, many courts are even more deferential, requiring entry of an injunction unless the General Counsel's theory of violation is "frivolous or insubstantial." *Id.* at 1648-1649.[7]

Adoption of a 10(j) or 10(l) standard in section 405 preliminary order cases would plainly satisfy due process, and still further the congressional purpose of affording employees a quick and effective remedy by discouraging employers from resisting preliminary reinstatement unless the Secretary's preliminary findings were plainly without basis. On the other hand, if employers could obtain a full-fledged administrative trial on the factual and legal grounds for the discharge, or even a detailed judicial review of the evidentiary basis of the Secretary's preliminary findings, they would be encouraged to oppose reinstatement in every case. Not only would such delay de-

[7]The courts have been divided in section 10(j) cases, and to a lesser extent in section 10(l) cases, about whether they have the authority to withhold relief based on their assessment of the balance of the equities. *Id.* at 1641, 1650. That question would not arise in section 405(e) cases, because Congress has determined that, when there is reasonable cause to believe a discharge was retaliatory, the equities and the public interest require preliminary reinstatement.

crease the value of the reinstatement remedy, but it might well make implementation of section 405 unworkable in a large number of cases. By adopting the standard of limited review suggested here, backed up by the penalties imposed for unreasonable defenses under Rule 11 of the Federal Rules of Civil Procedure, the courts would serve the congressional purpose of providing a quick and expeditious remedy, without raising any questions about whether the Secretary's own decision-making procedures violated due process.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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July 25, 1986

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*Counsel wish to acknowledge the assistance of Julie Fosbinder, the General Counsel of TDU, and Andrew Dwyer, a paralegal.

No. 85-1530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. McMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Appellants,

v.

ROADWAY EXPRESS, INC.,

Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR CENTRAL OHIO COAL COMPANY, CONSOLIDATION COAL COMPANY, EASTERN ASSOCIATED COAL CORP., SOUTHERN OHIO COAL COMPANY, U.S. COAL, INC., and WINDSOR POWER HOUSE COAL COMPANY AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 85-1530

WILLIAM E. BROCK, SECRETARY OF LABOR, AND
ALAN C. McMILLAN, REGIONAL
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THE INTEREST OF *AMICI CURIAE*

Central Ohio Coal Company, Consolidation Coal Company, Eastern Associated Coal Corp., Southern Ohio Coal Company, U.S. Coal, Inc., and Windsor Power Coal Company [hereinafter collectively referred to as "*Amici* Employers"] have a very substantial involvement in the operation of coal mines throughout the United States. Last

year, *Amici* Employers collectively produced over sixty-seven million (67,000,000) tons of coal, accounting for a substantial portion of the production of all coal mines in the United States. And, *Amici* Employers provide jobs to approximately sixteen thousand (16,000) coal miners.

Like trucking, coal mining is necessarily a very safety-conscious industry. The Federal Mine Safety and Health Act of 1977 ["Mine Act"], 30 U.S.C. § 801 *et seq.*, contains the statutory federal safety standards applicable to coal mines. Included in the Mine Act is a provision under which temporary reinstatement can be sought for a miner claiming that his discharge resulted from his making a safety-related complaint. 30 U.S.C. § 815(c). The Secretary of Labor ["Secretary"], in conjunction with the Federal Mine Safety and Health Review Commission ["Mine Commission"], is responsible for enforcing the miner discrimination statute. The statute provides that if the Secretary, upon investigation, finds that the discrimination charge was "not frivolously brought," the Mine Commission, "on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the [discrimination] complaint." *Id.*

The Mine Commission recently revised its procedural rules governing temporary reinstatement to provide mine operators an opportunity for an expedited, limited evidentiary hearing before an administrative law judge prior to the issuance of an order of temporary reinstatement. The revision was prompted by the holding of the Sixth Circuit Court of Appeals in *Southern Ohio Coal Co.* v. *Secretary of Labor*, 774 F.2d 693 (1985), *reh. denied and modified*, 781 F.2d 57 (1986), which sustained mine operators' consitutional right to such a hearing.[1] *See*, 51 Fed. Reg. 16,022 (1986), (to be codified at 29 C.F.R. § 2700.44).

Amici Employers acknowledge that the procedures under

[1] *Amici* Southern Ohio Coal Company and U.S. Coal, Inc. were appellees in *Southern Ohio Coal*.

the Mine Act are dissimilar to those utilized under § 405 of the Surface Transportation Assistance Act of 1982 ["STAA"], 49 U.S.C. § 2305. And, *Amici* Employers recognize the long-standing rule of this Court not to formulate a constitutional ruling broader than is required by the precise facts to which it is to be applied. *United States* v. *Raines*, 362 U.S. 17, 21 (1960). But, *Amici* Employers are vitally interested in the instant case inasmuch as the Secretary's sweeping attack on Roadway's constitutional right to a meaningful pre-deprivation hearing could be aimed to transcend the confines of the instant case and adversely implicate the interests of mine operators who are also subject to a temporary reinstatement procedure — albeit under a different statute. To a large extent, this concern arose from the Secretary's characterization of the issue in the instant case as "closely related to the constitutionality of the temporary reinstatement remedy under [the Mine Act]." [Secretary's Jurisdictional Statement, p. 21].

Inasmuch as the Secretary has persisted in substantially distorting and confusing the various interests which must be balanced in order to ascertain the constitutionally mandated procedural safeguards for federal temporary reinstatement procedures, *Amici* Employers believe their views — as another class of large employers subject to a temporary reinstatement procedure — may be of aid in achieving an accurate constitutional analysis of the procedures under § 405 of the STAA. At the same time of course, the appearance of *Amici* Employers is warranted in an effort to avoid any attempt by the Secretary to indirectly debilitate mine operators' recently sustained due process rights by means of a broad-based attack on Roadway's identical rights in this proceeding.

This Brief is filed with the consent of the Secretary and Roadway. [Appendix A and B].

SUMMARY OF ARGUMENT

The overriding question presented by this case is, what process is due an employer *prior* to the Secretary ordering immediate reinstatement of an undesired employee under § 405 of the STAA.

This Court has made clear that the Due Process Clause of the Fifth Amendment to the United States Constitution entitles an aggrieved party to *meaningful* notice and a *meaningful* opportunity to present its case *prior* to the deprivation of a significant property interest. The parties here do not dispute that a temporary reinstatement order implicates a protectible property interest of an employer. Thus, the essence of the inquiry here is to determine what constitutes "meaningful" procedural protection under the flexible concept of due process. And, that determination can only be made properly after a thorough analysis of: the competing interests; and the risk of erroneous deprivation attendant to the particular application of the temporary reinstatement remedy of § 405 of the STAA.

An employer's interest centers on its right and concern of avoiding the substantial impact — on both the operation of its business and its other employees — of compulsory reinstatement of an unsatisfactory employee, through the opportunity, *before* the harm is done, to meet the evidence leveled against it and demonstrate the true nature of the employee's allegations. Absent adequate procedural safeguards, law-abiding employers are subjected to what can be a lengthy — or in the case of § 405, an *indefinite* — period of unjustified "temporary" employee reinstatement which seriously jeopardizes the maintenance of effective business operations.

The public interest in providing prompt reinstatement of employees who have been unlawfully discharged for reporting safety violations — proffered by the Secretary as the principal competing interest to that of the employer — is not impaired simply by requiring that an employer be afforded an

opportunity for a meaningful hearing *prior* to ordering reinstatement. The fear of employer-caused delays espoused by the Secretary and *Amicus Curiae* Teamsters for a Democratic Union can be obviated easily through the use of procedures similar to those with which Congress and the Secretary have substantial experience under other employee protection statutes. Moreover, the validity of the Secretary's vigorous challenge to the short time needed for a meaningful pre-order hearing as destructive of the claimed essence of the effectiveness of § 405 — promptness — is questionable inasmuch as at the same time, the Secretary tolerates an investigation such as the one here which exceeded the statutorily-prescribed time period by nine (9) months. Clearly, at some point during what can be a very lengthy investigatory period — if and when it becomes clear to the investigator that reasonable cause exists to believe a violation has occurred — a short time can be set aside to afford an employer a *meaningful* hearing opportunity.

Just as the balancing of the competing interests support the conclusion that a *pre*-deprivation evidentiary hearing before an impartial decision-maker is warranted, the overwhelming risk of erroneous deprivation inherent in the mechanism for temporary reinstatement under § 405 similarly mandates that procedural safeguard. Section 405 fails to guarantee any procedural protection of an employer's substantial interest in avoiding erroneous compulsory reinstatment of a terminated employee. The statute requires no more than: notification "of the filing of the complaint;" and an "investigation" by the Secretary prior to ordering temporary reinstatement. Such "notice" and the procedure for the Secretary's investigation — which is seriously deficient both in terms of reliability of result and fairness — plainly constitute a grossly inadequate substitute for the constitutional entitlement to meaningful notice and a meaningful opportunity to be heard.

At no point during the course of the investigation is an employer afforded a meaningful opportunity to respond. Pursuant to the investigatory "guidelines" adopted by the

Secretary and contrary to the statutory direction [49 U.S.C. § 2305(c)(1)], the employer routinely is not even contacted until *after* the investigator has concluded that the complainant's allegations establish a *prima facie* violation. Moreover, inasmuch as the investigator is *not* required to disclose even the substance of the evidence compiled, the employer is placed in the untenable position of having to disprove the complainant's case *without* benefit of knowing the claimed evidence which is relied upon by the investigator. The Secretary's "guidelines" are entirely subject to implementation in a manner fully within the discretion of the individual investigator and are otherwise ill-suited to insuring a reliable and impartial decision on the temporary reinstatement issue under § 405. These deficiencies are constitutionally fatal to the procedure.

Moreover, the principle of having the same individual investigate, essentially dictate the decision, and support subsequent post-deprivation litigation against the employer is plainly incompatible with objective adjudication of the temporary reinstatement issue. Absent some procedural regularity and adversarial input in the process of compiling diverse information and making the difficult credibility and veracity judgments inherent in employee discharge cases, the risk of error is plainly substantial. And, such error is not corrected by the subsequent "file review" by the investigator's superiors. The assistance of an adversarial hearing before an impartial adjudicator, complete with a cross-examination opportunity, *prior* to any order of reinstatment is critical to minimizing the extremely high risk of error otherwise faced by an employer under § 405.

Therefore, the requisite thorough analysis of all the factors relevant to a due process inquiry clearly indicates that an employer confronted with the possible reinstatement of a terminated employee is entitled, at a minimum, to the procedural protection which the Court below found to be mandated by the Due Process Clause.

ARGUMENT

THE SECRETARY'S INTEREST IN NOT AFFORDING A MEANINGFUL HEARING PRIOR TO ORDERING TEMPORARY REINSTATEMENT OF AN UNSATISFACTORY EMPLOYEE IS CLEARLY OUTWEIGHED BY: THE SUBSTANTIAL INTEREST OF THE PRIVATE SECTOR EMPLOYER AFFECTED BY THE ACTION; AND THE NEED FOR AND USEFULNESS OF ADDITIONAL PROCEDURAL SAFEGUARDS TO LESSEN THE RISK OF GOVERNMENT ERROR

The constitutional standard against which any government temporary reinstatement procedure must be measured is that established by the Due Process Clause of the Fifth Amendment to the United States Constitution. Inasmuch as there is no dispute that compulsory temporary reinstatement of a discharged employee involves a protectible property interest of an employer [*see*, Brief of Secretary, p. 16], the only question presented by this appeal is, what process is due to protect against an erroneous deprivation of that interest.

All parties agree that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Thus, more specifically stated, the Court is being called upon in this case to define the concept of "meaningful" in regard to application of the temporary reinstatement remedy in § 405 of the STAA.

As the Court's previous decisions make clear, due process is a flexible concept, with the measure of procedural protection mandated by the Constitution being dependent upon the specific circumstances and interests involved in the particular deprivation of property. *See, e.g., Mathews*, 424 U.S. at 334. And, a procedural due process analysis requires consideration of three principal factors:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation

> of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> *Mathews*, 424 U.S. at 335.

In applying the *Mathews* criteria, the Court below quite properly began its analysis with the premise that the dictates of due process require, at a minimum, that notice and a meaningful opportunity to be heard *precede* deprivation of a significant property interest. [J. S. App. 6a].[2] And, the District Court reached its conclusion — that a *meaningful* pre-deprivation hearing opportunity for an employer in the present context must include "an opportunity to present his side and a chance to confront and cross examine witnesses" — *only after* thoroughly considering: the competing interests of the employer and Secretary; and the risk of erroneous deprivation attendant to the government's decision concerning temporary reinstatement under § 405. [J.S. App. 6a-9a].

While the Secretary has protested that "rarely" has this Court required an evidentiary hearing before the government may temporarily deprive an individual of his property [Brief of Secretary, p. 19], *never* before has this Court contrasted a governmental desire not to hold a pre-deprivation hearing with a private employer's interest against erroneous compulsory reinstatement. And, *never* before has this Court considered whether a government investigation of an employee discharge — in which the investigator both dictates the *ex parte* decision on grounds not revealed to the employer and participates in subsequent litigation as an advocate against the employer — satisfies the requirement of notice and a meaningful opportunity to be heard.

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2 References to those portions of the record reprinted in the Secretary's Jurisdictional Statement are denoted [J.S. App. ____]. The record contained in the Joint Appendix is referenced [J.A. ____].

The Secretary apparently has chosen to argue from inapposite precedent rather than meet the obligation to demonstrate in a *real-world* fashion how the balance of the *Mathews* factors — with regard to the *present* circumstances, procedures, and competing interests under § 405 — favors the Secretary's desire *not* to conduct some form of *fair* evidentiary hearing *prior* to ordering temporary reinstatement. *Amici* Employers submit, however, that an accurate focus in this case on the *Mathews* factors makes clear that the Secretary has failed to offer any justifying rationale for the blatant legislative and regulatory disregard of employers' due process rights under § 405; and thus, the statute and its implementing guidelines must be found unconstitutional.

1. Employers Possess A Substantial Interest In Avoiding The Erroneous Reinstatement Of An Employee

The merit of the remedy of reinstatement, when warranted, is not debated here by *Amici* Employers. An employer found to have violated a law for which reinstatement is the mandated remedy has no choice but to accept and adjust to the resultant impact of compulsory reinstatement. Nonetheless, the impact on an employer's business when forced to reinstate a formerly discharged employee cannot be minimized. The private interest in this case — an interest shared by *all* employers — centers on an employer's right and concern in avoiding the substantial impact of government-compelled reinstatement — even on a "temporary" basis — by having the opportunity, *before* the harm is done, to meet the evidence leveled against it and demonstrate that the former employee's allegations of an unlawful discharge are groundless.

Wrongful reinstatement infringes upon an employer's right to remove employees whose conduct impairs efficient operation and to do so with promptness. And, absent adequate procedural safeguards, law-abiding employers are subjected to

what can be a lengthy period[3] of unjustified, "temporary" employee reinstatement which jeopardizes the maintenance of employee efficiency and discipline essential for effective business operation. Moreover, reinstatement so easily gained — without substantiation of discrimination through a *fair* hearing process — may impress upon other employees the apparent lack of necessity of either maintaining a good work ethic or adhering to disciplinary policy in order to maintain their positions. It must be recognized that while a complainant's fellow employees have an interest in a safe environment and remedying unlawful retaliation, those same employees have an equal interest in not being forced to work alongside a person who may be undesirable for any number of reasons which do not contravene any law. The District Court summed up these concerns by embracing the sound reasoning of this Court in *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974), which is universally applicable to all employment situations:

> [p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.
>
> [J. S. App. 7a]

[3] In the instant case, nine (9) months elasped between issuance of the prehearing order of temporary reinstatement and the post-hearing recommended order. [Roadway's Motion To Affirm, p. 16]. The period of "temporary" reinstatement under § 405 has *no* limit under the Secretary's interpretation. The Secretary considers the one hundered and twenty (120) day period within which the statute requires a final order to issue as not commencing until *after* the administrative law judge issues a recommended decision. The time expended by the judge in reaching the recommended decision is entirely unregulated. Therefore, considering the range of work habits and caseload of the individual judges, an employer could be exposed to erroneous deprivation from several months to several years. The possible length of the deprivation — indefinite under § 405 — is an important factor in assessing the impact on the interest of an employer. *Mackey* v. *Montrym*, 443 U.S. 1, 12 (1979). In *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979), the temporary suspension of a horse trainer's license was ruled unconsitutional because the government's post-deprivation procedures (although providing for a full post-suspension hearing) failed to insure a *prompt* proceeding *and prompt* disposition of all outstanding issues.

Further, the District Court appropriately recognized that, while the findings of an arbitration board are not given *res judicata* or collateral estoppel effect in a subsequent statutory proceeding [J. S. App. 16a], an employer has a substantial interest in not having an arbitration award upset by a *preliminary* order issued *without first* affording the employer a *meaningful* opportunity to be heard. [J. S. App. 7a].

The Secretary's cavalier attempt to minimize the employer's interest by arguing that an employer is not harmed because it will receive a day's work for a day's pay [Brief of Secretary, p. 26], overlooks every one of the employer, and fellow-employee, concerns described above — and the practical reality of a business operation.

Moreover, in asserting that temporary reinstatement of an unsatisfactory employee creates only an "incremental reduction in the employer's control of his workforce, which involves one employee out of many . . ." [Brief of Secretary, p. 29], the Secretary either misapprehends or is choosing to ignore the integral role played by an individual employee in the collective effort. First, an employee rarely works in an environment segregated from others. Employees interact among themselves and with their supervisors in a working relationship on a frequent basis. Moreover, an employee's individual contribution is vital to the success of the entire enterprise. Correspondingly, the impact on a business of the presence of one unsatisfactory employee impedes the collective effort. *Amici* Employers strongly dispute that, on balance, the asserted "benefit" received by an employer from the labors of an unsatisfactory employee offsets in any realistic way the irreparable harm caused by a *wrongful* temporary reinstatement.

For these reasons, the District Court in the instant case properly concluded that Roadway's interest against being exposed to erroneous reinstatement of an unsatisfactory employee is substantial. [J. S. App. 7a].

2. The Secretary Has Failed To Demonstrate That Congress' Goal Of Promoting Highway Safety By Using Temporary Reinstatement To Remedy Employee Discrimination Is Infringed By Affording An Employer A Meaningful Pre-Order Hearing

Another factor in the *Mathews* consideration involves the governmental interest — including the fiscal and administrative burdens associated with an evidentiary hearing held prior to the issuance of a temporary reinstatement order. The Secretary and *Amicus Curiae*, Teamsters For A Democratic Union ["TDU"], elaborate in detail the importance of highway safety and the Congressional objective of encouraging employee reporting of statutory violations without fear of reprisal by an employer. [Brief of Secretary, pp. 30-35; Brief of TDU, pp. 8-9, 15]. *Amici* Employers fully agree that there is a statutorily-evidenced strong public interest in: highway safety; encouraging employees to report violations; and providing prompt reinstatement of employees who have been discharged for unlawful reasons. However, *Amici* Employers take strong exception to the assertions of the Secretary and TDU that affording an employer a *meaningful pre*-deprivation hearing would "thwart" those goals underlying § 405. [Brief of Secretary, p. 37; see generally, Brief of TDU, pp. 8-9, 15].

Both the Secretary and TDU reason that permitting an employer a meaningful pre-deprivation hearing will provide the employer with a means of delaying reinstatement to the extent of causing intolerably longer periods of unemployment, thereby discouraging employee-reporting. [*Id.*] However, the Secretary and TDU fail to acknowledge that the delay, if any, which would result from affording an employer a pre-order hearing is solely a function of the procedures established by Congress or the Secretary for adapting the temporary reinstatement process to the dictates of due process. An employer plays no role in the timing of the hearing and can be precluded procedurally from causing those delays feared so disastrous by the Secretary and TDU.

The procedure under the Mine Act plainly illustrates how potential delays can be minimized. If the Secretary concludes from investigation that an employee's discrimination complaint was "not frivolously brought," the statute requires the Mine Commission to decide the Secretary's application for temporary reinstatement "on an expedited basis." 30 U.S.C. § 815(c)(2). The now-existing procedure implementing the statute's temporary reinstatement remedy limits an employer to ten (10) days in which to request a preliminary evidentiary hearing on the issue of whether the complaint was frivolously brought. 29 C.F.R. § 2700.44(b) [51 Fed. Reg. 16,024 (1986)]. The procedure then requires the hearing to be held no later than ten (10) days from the employer's hearing request. *Id.* Only if "compelling reasons are shown" may the employer obtain an extension of time. *Id.* The administrative law judge is required to issue an order regarding temporary reinstatement within five (5) days of the close of the hearing. 29 C.F.R. § 2700.44(d) [51 Fed. Reg. 16,024 (1986)]. Although the employer is afforded five (5) days to appeal the order to the Mine Commission, such an appeal does *not* stay the effect of the judge's order unless the Mine Commission directs otherwise. 29 C.F.R. § 2700.44(e) [51 Fed. Reg. 16,024 (1986)].

Moreover, the Secretary has extensive experience in implementing other federal employee-protection statutes under which a constitutional *pre*-order evidentiary hearing is conducted without impeding the goal of expeditious reinstatement. Under the employee-protection provisions of the Energy Reorganization [Atomic Energy] Act of 1974 [42 U.S.C. § 5851], the Clean Air Act [42 U.S.C. § 7622], the Water Pollution Control Act [33 U.S.C. § 1367], the Safe Drinking Water Act [42 U.S.C. § 300j-9(i)], the Toxic Substance Control Act [15 U.S.C. § 2622], and the Solid Waste Disposal Act [42 U.S.C. § 6971], the Secretary is charged with the responsibility of expeditiously handling employee discrimination complaints. 29 C.F.R. § 24.1(b). The corresponding procedure promulgated by the Secretary

minimizes any delay associated with conducting a *pre*-order evidentiary hearing before an administrative law judge. An employer must request a hearing within five (5) days of the Secretary's investigative determination that a violation occurred. 29 C.F.R. § 24.4(d)(3)(i). Following receipt of the employer's request, the administrative law judge is permitted seven (7) days, at most, to schedule the hearing. 29 C.F.R. § 24.5(a). The parties are entitled to only a five (5) day notice of the hearing. *Id.* Because of time constraints imposed upon the Secretary by the statutes, the procedure provides that "no requests for postponement shall be granted except for compelling reasons." *Id.* Finally, the judge is required to issue a recommended decision within twenty (20) days of the close of the evidentiary hearing. 29 C.F.R. § 24.6(a).

Thus, the Secretary's forecast of intolerable employer-caused delays is contradicted by the Secretary's own procedural experience under numerous other employee-protection statutes. Obviously, the health and safety interests promoted by those other statutes are no less important than highway safety. And, there is no suggestion — by Congress, courts, or anyone else — that the goals of those statutes are thwarted by providing an evidentiary hearing *prior* to ordering reinstatement.

The Secretary's over-dramatization of the impact of the short time required for a pre-order hearing under the STAA also rings hollow when considering the Secretary's own procedure currently used to implement the goals of § 405. The procedure defines the sixty (60) day statutory period during which the investigation is supposed to be completed as only "directory." OSHA Instruction DIS. 4A, at IX-7(D)(13). This guideline instructs that "there may be instances when it is not possible to meet the directory period set forth in § 405 (2)(A)[sic]". *Id.* While *Amici* Employers do not dispute the desirability of a thorough investigation, they do question the validity of the Secretary's vigorous challenge to the short time needed for a pre-order evidentiary hearing as destructive of the claimed essence of the effectiveness of § 405 — promptness — when at the same time, the Secretary, by treating the sixty (60) day period as "directory," permitted the time of the investigation to exceed the statute's suggested period of sixty (60) days. [Brief of Secretary, p. 41]. There is clearly no rational explanation for the Secretary's desire to rush in *after* eleven (11) months of investigation and demand *immediate* reinstatement without a hearing.[4]

Under all employee-protection statutes, a complaining employee is faced with some time of unemployment while the responsible agency investigates the complaint. Certainly, at some point during what apparently can be a very lengthy investigatory period — if and when it becomes clear to the investigator that reasonable cause exists to believe a violation has occurred — a short time can be set aside to hold a hearing to allow an employer a *meaningful* opportunity to address the evidence and present its version of the facts.

Inasmuch as lengthy *investigatory* delays clearly are tolerable to the Secretary and any additional delay attendant to conduct a pre-order evidentiary hearing can be procedurally minimized to be negligible in comparison, the obvious question is: what public interest is at stake when a *pre*-order evidentiary hearing is held in these circumstances? Upon full consideration of the circumstances, the Secretary's seeming "interest" is simply the "desire" *not* to have a meaningful hearing before ordering reinstatement. And, that "interest" pales in comparison to an employer's interest in having a meaningful opportunity to defend its discharge of an unsatisfactory employee *before* being compelled to reinstate that employee — even temporarily.

Clearly, the administrative and fiscal burdens associated

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4 And, for those rare emergency cases where some reason *may* exist, provision could be made for a procedure similar to that under Rule 65(b) of the Federal Rules of Civil Procedure. Under such a procedure, if the Secretary could specify the need for immediate reinstatement and the reasons why notice and an opportunity to respond need not be afforded the employer, an administrative law judge could order temporary reinstatement — pending a prompt hearing on the matter.

with affording an evidentiary hearing before an impartial adjudicator are not significant factors in the balance. Not surprisingly, the Secretary makes only passing mention of those factors. [Brief of Secretary, p. 38]. This is *not* a "mass justice" type of case as was the situation confronted in *Mathews*, 424 U.S. at 347, where, in the context of the administration of social security benefits, the Court noted that the expense of constitutionalizing the benefit termination procedures would not be "insubstantial."[5]

In the instant case, the Secretary has not disclosed the number of discrimination complaints that have been filed each year under § 405 or, more significantly, how many *ex parte* orders of temporary reinstatement have been issued. Absent such disclosure by the Secretary of the statistics pertaining to § 405, there is *no* basis on which to predicate a conclusion that any substantial administrative or fiscal burdens would attend affording employers pre-deprivation hearings before impartial adjudicators under the STAA. Moreover, as is the case with avoiding delays, Congress could preclude what it may perceive as additional fiscal and administrative burdens by choosing to model an amended § 405 after the majority of other federal employee-protection statutes. See, pp. 13-14, *supra*.

Regardless of how Congress chooses to implement the requirement of due process in § 405, any burden which might result clearly fails to outweigh the other factors which plainly favor affording an employer *meaningful pre*-deprivation due process.

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[5] Indeed, in 1974 alone, 122,793 hearing requests were received by the Social Security Administration, representing a 300% increase from only four year's earlier. Only 80,779 of those requested hearings were able to be conducted in that year. Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1284, n. 91 (1975). The number of § 405 complaints believed to be meritorious after investigation for which a hearing opportunity would arise most assuredly would be negligible in comparison.

3. A Government Investigation Into The Merits Of A Private Sector Discharge Which Essentially Dictates The Decision Concerning Temporary Reinstatement And Supports Any Resultant Prosecution Of The Alleged Discrimination Violation Creates An Overwhelming Risk Of Erroneous Deprivation

As a final factor, the *Mathews* balancing process focuses on the "risk of an erroneous deprivation of [an employer's] interest through the procedures used [by the Secretary], and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335. The Secretary has conceded that an employer possesses a constitutional right to some kind of hearing *prior* to being ordered to temporarily reinstate an unsatisfactory employee. [Brief of Secretary, p. 17]. The Secretary, however, has claimed that an investigation, which includes some unregulated contact with the employer, provides all the pre-deprivation process that is due. [Brief of Secretary, pp. 17, 39-40]. *Amici* Employers submit that the Secretary's argument is meritless. A government investigation of a factually complex employee discharge by the individual who essentially dictates the decision concerning temporary reinstatement and who, at the same time, builds the case for and participates in subsequent litigation against the employer plainly cannot satisfy an employer's right to notice and a *meaningful* opportunity to be heard.

An examination of the current § 405 pre-deprivation procedure offers a clear explication of why the government investigatory process is not sufficiently reliable and why, therefore, an evidentiary hearing held before an impartial adjudicator *and* prior to the issuance of a temporary reinstatement order is of substantial value. There should be little dispute that, on its face, § 405 of the STAA fails to guarantee an employer adequate procedural due process prior to an order of temporary reinstatement. The statute only requires that the employer be notified "of the filing of the complaint" and that an investigation by the Secretary be conducted to determine "whether there is reasonable cause to believe that

the complaint has merit." 49 U.S.C. §§ 2305(c)(1) and (2). This procedure provides an employer neither *meaningful* notice nor a *meaningful* opportunity to be heard. And, the internal investigatory "guidelines"[6] relied on by the Secretary to constitutionalize § 405 also fail to offer an employer any semblance of the constitutionally required notice or a *meaningful* opportunity to be heard.

The investigation procedure is the very same as that used to investigate discrimination complaints under OSHA's analogous employee protection statute — § 11(c) [29 U.S.C. § 660(c)]. See, OSHA Instruction DIS. 4A, at IX-5(D)(6). Unlike § 405, however, there is no provision for *ex parte* temporary reinstatement under § 11(c). Instead, if the Secretary concludes from his investigation that a violation of the OSHA statute has occurred, he must bring an action in a United States District Court to obtain an order for reinstatement and backpay. 29 U.S.C. § 660(c)(2). That investigative procedure for OSHA's § 11(c) — which, at the outset, sets the focus for the investigation on building a case *against* the employer [see, *e.g.*, OSHA Instructions DIS. 4A at V-3(D)(1); V-3(D)(2)(c)(2); V-5(D)(3)(b); V-7(D)(6)] — is entirely ill-suited to qualifying as a *meaningful* opportunity to be heard on an unbiased basis as is necessary for proceedings under the STAA's § 405 which does not involve the unbiased forum of a District Court.

The procedure commences with an instruction to the investigator that "[t]he complainant's side of the investigation

[6] The "guidelines" relied upon by the Secretary are not mandated by any regulation or statute. They do not have the force and effect of law, nor do they confer procedural or substantive rights upon individuals. See, *H. B. Zachry Co.*, 1980 OSHD ¶24,196 (1980), *aff'd* 638 F.2d 812 (5th Cir. 1981); *FMC Corp.*, 1977-1978 OSHD ¶22,060 (1977). And, inasmuch as the procedure has changed since the investigation pertaining to the case *sub judice*, there is absolutely no assurance that such procedure will not change again. Moreover, the investigator is not even required to adhere to the "guidelines"; they are just that — guidelines, which the investigator has "individual discretion . . . in implementing." OSHA Instruction DIS. 4A, at V-1(A)(2).

shall be developed as thoroughly as possible." OSHA Instruction DIS. 4A, at V-5(D)(3)(b). And, although § 405(c)(1) of the STAA requires the Secretary to notify the employer of the filing of the complaint *upon receiving* it, the investigatory policies direct the *completion* of the investigation of the complainant's allegations *before* making the initial contact with the employer. See, OSHA Instruction DIS. 4A, at V-5(D)(4). Thus, employers are further prejudiced by being denied an early opportunity to gather and preserve evidence.

By the time initial contact is made with the employer, the investigator already is convinced that the complainant has established a *prima facie* violation — or there would be no reason to contact the employer. At that point, because the "guidelines" do *not* require the investigator to disclose the substance of the evidence compiled, the employer is placed in the untenable position of having to disprove the complainant's case *without* benefit of knowing the claimed evidence which is relied upon by the investigator.[7] This was precisely the situation confronted by Roadway in the present case. [Roadway's Motion To Affirm, pp. 3, n.2, 4].

There can be no fair dispute over the right to know the nature of the evidence on which the administrative agency relies. Friendly, *supra*, 123 U. Pa. L. Rev. at 1283. In

[7] The Secretary has argued that the investigatory "guidelines" include an "implicit . . . obligation" for the investigator to disclose to the employer the substance of the evidence against it. [Brief of Secretary, p. 40, n. 19]. However, recognizing the Secretary's apparent regard for confidentiality [Brief of Secretary, pp. 46-47], it is very unlikely that an investigator will disclose any more than the "guidelines" actually state — *i.e.*, the "substance of the complaint." OSHA DIS. 4A, at V-5(D)(4). In the instant case, the Secretary had to rely on the parties' arbitration proceedings as having provided Roadway with sufficient notice of the evidence against it. The Secretary's resort to inferences from broad and discretionary internal "guidelines" and reliance upon a private arbitration proceeding to satisfy due process highlight not only the deficiencies in the Secretary's procedure but also the fallacy of the Secretary's ultimate proposition that his investigation substitutes as notice and a meaningful opportunity to be heard.

Cleveland Board of Education v. *Loudermill*, 470 U.S. 532, 84 L.Ed.2d 494 (1985), this Court construed the requirement of a meaningful opportunity to respond to include an explanation of the evidence against the respondent. 470 U.S. at ——, 84 L.Ed.2d at 506. Here, the Secretary's procedure does not require the investigator to reveal even the substance of the evidence gathered during the investigation prior to ordering temporary reinstatement. This failure alone plainly invalidates any suggestion that a *meaningful* opportunity to be heard is had during such an investigation.

The risk of error and procedural unfairness arising by application of the Secretary's guidelines are further magnified as the investigation progresses. After the employer is provided with an entirely ineffective opportunity to respond to anything more than the bare charge, the Secretary's policies direct the investigator to give the complainant the *final* word in an effort "to resolve any discrepancies or counter-allegations resulting from contact with the respondent." OSHA Instruction DIS. 4A, at V-7(D)(6). And, the investigation is not to terminate at any stage unless "it can be conclusively shown that a *prima facie* case cannot be developed." OSHA Instruction DIS. 4A, at V-4(D)(2)(c)(2). In the end, the investigator is called upon to prepare a recommendation for disposition of the case. OSHA Instruction DIS. 4A, at VI-3(C)(2)(n). The investigator's conclusions, presumably supported by his investigation file, essentially dictate the *ex parte* decision. Subsequent review by supervisory officials simply consists of weighing the investigator's recommendation "against the evidence available in the file." OSHA Instruction DIS. 4A, at IX-6(D)(9).

This process clearly highlights why the assistance of an adversarial evidentiary hearing before an *impartial* adjudicator *prior* to any order of temporary reinstatement is critical for lessening what otherwise would remain a substantial risk of erroneous deprivation.

The reliability of the investigator's fact-finding, proffered as a meaningful opportunity for the employer to be heard, necessarily must be examined in light of the nature of the inquiry involved. Where the basis for administrative action consists of *objective* or *historical* facts that are within the personal knowledge of the government investigator or readily ascertainable by him, the risk of error is not as likely. *Mackey* v. *Montrym*, 443 U.S. 1, 13-14 (1979). "It is only where the inquiry is 'sharply focused' and 'easily documented' that ex parte administrative investigations are considered reliable." *Mathews*, 424 U.S. at 343-344. But, where the facts are likely to be disputed, pre-deprivation procedural protection is required. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 18 (1978); *Goldberg* v. *Kelly*, 397 U.S. 254, 269-270 (1970).

In *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), this Court examined § 204 of the Social Security Act [42 U.S.C. § 404] pursuant to which there is no recoupment of an erroneous overpayment of benefits if the recipient requests and is granted a waiver of recovery by the Secretary of the Department of Health, Education, and Welfare. The statute provides a waiver for "any person who is without fault if such adjustment or recovery would defeat the purpose of this Subchapter or would be against equity and good conscience." 42 U.S.C. § 404(b). The issue presented was whether an oral hearing opportunity had to precede the HEW Secretary's decision on the recipient's written waiver request. 442 U.S. at 695. And, the Court held that a pre-waiver decision oral hearing was required since the HEW Secretary's assessment of fault, equity, and good conscience "is inherently subject to factual determination and adversarial input." 442 U.S. at 696, *citing*, *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 617 (1974).[8]

In reaching its conclusion, the Court expressly recognized the value of conducting a pre-waiver decision evidentiary hearing before an impartial decision-maker in observing that since the HEW Secretary had implemented the hearing requirement mandated by the lower courts — which included

[8] After concluding that "the nature of the statutory standards [made] a hearing essential" the Court found it unnecessary to also examine the requisites of constitutional due process. 442 U.S. at 693.

the opportunity for the recipient to present "testimony and evidence and cross-examine[ ] witnesses" — thirty percent (30%) of the HEW Secretary's initial determinations had been reversed. *Id.*

> This rate of reversal confirms the view that, without an oral hearing, the Secretary may misjudge a number of cases that he otherwise would be able to assess properly.
>
> . . .
>
> *Id.*

As in the instance of the situation in *Yamasaki*, "questions involved in reinstatement proceedings are 'inherently subject to factual determination and adversarial input'," *Southern Ohio Coal Co.*, 774 F.2d at 693, *quoting*, *Mitchell*, 424 U.S. at 617; therefore, an adversarial evidentiary hearing prior to the reinstatement decision similarly is required.

Nevertheless, the Secretary's procedure applicable here expressly directs the *investigator* to resolve "(q)uestions of credibility and reliability of evidence" as part of his investigation. OSHA Instruction DIS. 4A, at VI-3(C)(2)(1). Moreover, these questions are resolved in the context of an investigation which strives to provide the complainant every opportunity to make his case, including the opportunity for the final word in response to the employer's position — a position which is presented without benefit of knowing the evidence relied upon by the investigator. Even assuming, *arguendo*, the complete neutrality of the Secretary's investigator when compiling diverse information and making judgments regarding credibility and veracity, there plainly is an extremely high risk of error inherent in the Secretary's proffered decision-making process.

Moreover, in light of the procedure utilized by the Secretary, a completely unbiased investigation cannot be so easily presumed. The risk of error is substantially increased under that procedure by the joinder of the investigative, prosecutive, and adjudicative functions within one entity.

The prosecutorial emphasis inherent in the Secretary's "investigative" procedure cannot be overlooked. And, the investigator/prosecutor essentially dictates the decision regarding temporary reinstatement. Simply by working for the agency responsible for enforcing § 405 and being guided by a procedure developed to support successful litigation of discrimination charges, the investigator is almost certain to develop, through investigative zeal, a "will to win" that is incompatible with objective adjudication of the temporary reinstatement issue.[9] Inasmuch as the decision-maker is part and parcel of the enforcing entity (and thus not removed from a suspicion of bias), the greater the need for additional procedural safeguards. And, that need is even more compelling where, as here, the manner of implementing the applicable procedural "guidelines" — including those which may provide some procedural protection for an employer's interest — rests in large part within the discretion of the individual investigator. OSHA Instruction DIS. 4A, at V-1(A)(2). In sum, the field investigation is devoid of any guarantees of procedural regularity which characterize a hearing before an impartial adjudicator.[10]

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9 Significantly, over forty years ago, a provision was included in the Administrative Procedure Act [5 U.S.C. § 554(d)] in direct response to this conflict to provide that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision or agency review. . . ." *See*, Report of the Attorney General's Committee on Administrative Procedure. S. Doc. No. 8, 77th Cong., 1st Sess. 50 (1941).

10 *Amicus Curiae* TDU, although appearing in support of the Secretary, essentially concedes that due process requirements cannot be satisfied by the Secretary's investigation. [Brief of TDU, pp. 16-18]. Instead, TDU argues that an employer, by simply disregarding the Secretary's order of temporary reinstatement, can receive all the process that is due in the course of an enforcement action filed by the Secretary in District Court under § 405(e). [*Id.* at pp. 18-20]. However, that suggested alternative is of questionable viability both in terms of the plain language of § 405 and of placing a party actually seeking relief in a defensive posture before a court. Moreover, a recent decision construing the virtually identical enforcement mechanism under the employee-protection provision contained in the Energy Reorganization Act [42 U.S.C. § 5851(d)] indicates quite clearly that the District Court's enforcement duty is simply ministerial — thus excluding any substance from the judicial consideration of the matter. *Kansas Gas & Electric Co.* v. *Brock*, 780 F.2d 1505, 1514-15 (10th Cir. 1985).

The procedure *following* the investigation does not and cannot correct the errors made during the investigation. The investigator's superiors base their decision *solely* on the investigator's report and recommendation — the same report and recommendation which is not disclosed to the employer to allow for meaningful response. *See*, OSHA Instruction DIS. 4A, at IX-6(D)(9). Moreover, post-investigation review by the Secretary's designees certainly cannot be accepted as satisfying the concern of the need for impartial review inasmuch as those decision-makers then assist in representing the complainant in the post-deprivation proceedings.

The availability of a full post-deprivation hearing under § 405 cannot alone satisfy the requirements of due process. Only where the "potential length or severity of the deprivation does not indicate a likelihood of serious loss *and* where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous deprivation" is a post-deprivation proceeding constitutionally acceptable by itself. *Memphis Light, Gas & Water Division*, 436 U.S. at 19. As discussed above, the deprivation and harm to an employer's interest in efficiently operating its business caused by temporary reinstatement of an unsatisfactory employee is substantial. And, the length of that deprivation and harm is *indefinite* under the Secretary's interpretation of § 405. *Supra*, pp. 9-11. Finally, the Secretary's unreliable and ill-suited procedure for determining whether reasonable cause supports an order of temporary reinstatement provides very little hedge against an erroneous decision resulting from application of § 405, which itself fails to guarantee any measure of due process for an employer.

In sum, these numerous and serious constitutional defects in the reinstatement procedure under the STAA can only be eliminated by requiring that a *pre*-order evidentiary hearing be afforded an employer under § 405.

CONCLUSION

This Court has emphasized repeatedly that the Due Process Clause entitles the aggrieved party to a meaningful opportunity to present his case *and* have its merits fairly judged. Reflection upon the various interests and circumstances in the instant context leads to but one reasonable conclusion — a "meaningful" opportunity to be heard for Roadway (and other similarly situated employers) must include, at a minimum, an opportunity to know and respond to the evidence against it by confronting and cross-examining witnesses before an impartial decisionmaker and presenting evidence of its own.

An employer — such as Roadway or any of the *Amici* Employers — has a substantial interest against reinstating an unsatisfactory employee — even on a temporary basis. And, that interest expands as that "temporary" period lengthens. Moreover, a procedure like that utilized under § 405 in making the decision regarding temporary reinstatement is wholly unsuited for a valid *ex parte* decision and presents an overwhelming risk of producing an erroneous decision. Thus, additional safeguards are plainly mandated. And, the Secretary's interest in not affording a meaningful pre-deprivation hearing in these circumstances is trivial and has absolutely no relationship to the statutorily evidenced public interest in promoting highway safety — or safety concerns in other business operations. A balancing of the relevant factors clearly indicates that an employer confronted with the possible reinstatement — on a temporary or permanent basis — of a terminated employee is entitled, at a minimum, to the procedural protection which the Court below found to be mandated by the Fifth Amendment to the United States Constitution. In the specific instance of § 405 of the STAA, it is clear that the statute, on its face and as applied, plainly fails to "meet the essential standard of fairness under the Due Process Clause." *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982).

Accordingly, the judgment of the District Court of the unconstitutionality of the statute should be affirmed.

Respectfully submitted,

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(Counsel of Record)
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Mark S. Stemm
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APPENDIX A

Letterhead of U.S. Department of Justice
Office of the Solicitor General

July 1, 1986

Alvin J. McKenna, Esquire
Porter, Wright, Morris & Arthur
Twenty-Fifth Floor
1 Riverside Plaza
Columbus, Ohio 43215-2388

Re: No. 85-1530, *William E. Brock, et al.* v. *Roadway Express, Inc.*

Dear Mr. McKenna:

As requested in your letter of June 27, I hereby consent to the filing of a brief amicus curiae on behalf of the Central Ohio Coal Company, Consolidation Coal Company, Eastern Associated Coal Corporation, Southern Ohio Coal Company, U.S. Coal, Inc. and Windsor Power House Coal Company.

Sincerely,

/s/ Charles Fried
Solicitor General

cc: Joseph F. Spaniol, Jr., Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

APPENDIX B

Letterhead of Fisher & Phillips

July 3, 1986

Alvin J. McKenna, Esquire
Porter, Wright, Morris & Arthur
25th Floor
One Riverside Plaza
Columbus, Ohio 43215-2388

Re: *William E. Brock, et al.* v.
Roadway Express, Inc.
Supreme Court of the
United States
Case No. 85-1530

Dear Al:

I am in receipt of your letter on behalf of Central Ohio Coal Company, Consolidation Coal Company, Eastern Associated Coal Corporation, Southern Ohio Coal Company, U.S. Coal, Inc. and Windsor Power House Coal Company, indicating that you wish to appear as amicus curiae in the captioned matter. This letter is to advise you that the Respondent, Roadway Express, Inc., consents to your appearance as amicus.

By copy of this letter, I am so advising the office of the Solicitor General of the United States.

Very truly yours,

/s/ Michael C. Towers
For FISHER & PHILLIPS

MCT:mhb

cc: Honorable Charles Fried
Solicitor General of the United States

No. 85-1530

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM E. BROCK, Secretary of Labor, and
ALAN C. MCMILLAN, Regional Administrator,
Occupational Safety and Health Administration,
Appellants

v.

ROADWAY EXPRESS, INC.,
Appellee

On Appeal from the United States District Court for the Northern District of Georgia

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., AMICI CURIAE, IN SUPPORT OF APPELLEE

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Dated: September 20, 1986

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

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On Appeal from the United States District Court for the Northern District of Georgia

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., AMICI CURIAE, IN SUPPORT OF APPELLEE

Pursuant to Rule 36 of the Rules of this Court, American Trucking Associations, Inc. and all eleven of its affiliated trucking conferences[1] (hereinafter referred to

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[1] American Movers Conference; Film, Air and Package Carriers Conference, Inc.; Interstate Carriers Conference; Munitions Carriers Conference, Inc.; National Automobile Transporters Association; National Tank Truck Carriers, Inc.; Oil Field Haulers Asso-

collectively as "ATA") respectfully submit this brief as *amici curiae* in support of appellee, Roadway Express, Inc. ATA has sought and received the written consent of the parties to file this brief *amici curiae*, and the letters of consent have been submitted to the Court.

INTEREST OF THE AMICI CURIAE

American Trucking Associations, Inc. is the national trade association of the trucking industry. Through its individual trucking company members, affiliated state trucking associations, and conferences, ATA represents every type and class of motor carrier in the United States: for-hire and private; regulated and unregulated; union and non-union.

The other parties joining American Trucking Associations in this brief are its eleven affiliated conferences which represent specialized segments of the motor carrier industry.

The trucking industry has a vital interest in the safety of our nation's highways, the public, and its employees. Accordingly, ATA has made a significant investment of time, money and manpower in this important area. For example, ATA has been a leader in seeking increased enforcement of state and federal highway safety laws, legislation requiring a single, national commercial driver's license, more comprehensive drug and alcohol testing for motor carrier employees, and retention of the 55 mph speed limit.

ATA has also played a leadership role in the area of vehicle safety. The trucking industry has strongly supported the Department of Transportation's budget request for increasing the random roadside truck inspec-

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ciation, Inc.; Private Carriers Conference, Inc.; Regular Common Carriers Conference; Regional Distribution and Carriers Conference; and Specialized Carriers and Rigging Association.

tions program from $10 million to $50 million for fiscal year 1987.

ATA, therefore, supports the intent and concept of Section 405, Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 2305, to encourage the reporting of unsafe vehicles and safety violations.

While this case obviously has significant safety overtones, fundamentally the question presented to this Court is whether the Fifth Amendment right of parties to the guarantees of due process *prior* to government action depriving them of property will be upheld in a truck safety context.

As employers of millions of people, the trucking industry is necessarily concerned, as all employers must be, with its rights and responsibilities to discharge dishonest, disruptive employees, who may, by their attitudes and actions, compromise the integrity of the workplace and undermine the productivity and morale of fellow workers. In the case of trucking, such individuals may, in fact, endanger public safety in their roles as mechanics and drivers. Accordingly, ATA and its members have a substantial interest in the outcome of this matter.

SUMMARY OF ARGUMENT

It was Congress' intent to include due process protection for employers in § 405. The legislative history of the section, including the history of earlier legislative employee protection proposals, evidences an intent to insure employers some form of pre-reinstatement hearing. Of the many federal statutes containing employer protection provisions, the Government's implementation of § 405 stands alone in denying employers adequate due process protection.

Section 405 itself is silent on the pre-reinstatement hearing issue. The legislative history, however, strongly

shows the intent of Congress to include the requirement. Under this Court's longstanding rule to avoid unconstitutional interpretations of federal statutes when the language of the law permits a constitutional construction, the District Court's decision below is the correct one.

Finally, a pre-reinstatement hearing will not jeopardize fulfillment of the Congressional goal to encourage the reporting of safety complaints. An evidentiary hearing can easily be conducted during the investigatory period established by Congress. Thus, an unlawfully discharged employee will not suffer a prolonged period of unemployment and, correspondingly, the employee's incentive to bring safety complaints will not be deterred.

ARGUMENT

I. This Court May Avoid Deciding The Constitutional Issue In This Case By Relying On The Legislative History Of The Statute Which Manifests A Clear Intent To Provide For Due Process In § 405 Proceeding.

Section 405 on its face does not preclude a hearing prior to preliminary reinstatement, and the entire legislative history reveals the intent of Congress to provide for one.

The provisions of § 405 protecting motor carrier employees from retaliatory disciplinary actions because of safety complaints are directly traceable to several prior truck safety bills, beginning in the 95th Congress in 1978.[2] Under the initial bills the employee was required

[2] "Trucking Safety Act, "S. 2970, § 12, 95th Cong., 2nd Sess., 124 Cong. Rec. S10913 (daily ed. April 20, 1978); "Commercial Motor Vehicle Safety Act of 1979," S. 1390, § 109, 96th Cong., 1st Sess., 125 Cong. Rec. S10920 (daily ed. June 21, 1979); "Trucking Competition and Safety Act of 1979," S. 1400, § 226, 96th Cong., 1st Sess., 125 Cong. Rec. 16352, (daily ed. June 25, 1979); "Commercial Motor Vehicle Safety Act of 1980," H.R. 6398, § 109, 96th Cong., 2nd Sess., 126 Cong. Rec. 1530 (daily ed. January 31, 1980).

to seek redress through legal action in United States District Court.[3]. Thus, both the carrier and the employee would have received due process in a court of competent jurisdiction prior to the issuance of a reinstatement order.

Two years later, S. 1390, as passed by the Senate in 1980, created the right to seek redress before the Secretary of Labor, in lieu of costly court litigation. However, under the revision, the employer was still to be entitled to a hearing prior to the issuance of a reinstatement order. The bill provided that the Secretary, if after receiving a complaint and conducting a preliminary investigation, should conclude "that there is reasonable cause to believe that a violation has occurred, he shall accompany his [investigatory] findings with a *proposed* order providing the relief prescribed [in the statute]. Thereafter, either the person alleged to have committed the violation or the complainant may, within 30 days, file objections to the proposed order and request a hearing on the record." [Emphasis supplied.] S. 1390, § 109.

As the 97th Congress waned, the legislation at issue here was introduced. In the House, "The Surface Transportation Assistance Act," H.R. 6211, passed on December 6, 1982 without any employee protection provisions. S. 3044, the Senate version of the same act, was introduced by Senator Packwood on December 7, 1982 and included such provisions (§ 409, later § 405). The section tracked the one that had passed the Senate in S. 1390 in the previous Congress and *contained due process procedures*. On December 19, 1982, Senator Danforth spoke in favor of the bill and commented specifically on the protections for employers. 128 Cong. Rec. S15610 (daily ed. December 19, 1982).

Thus, all of the statements and testimony spanning three Congresses cited in favor of the safety statute were, in fact, supporting a procedure which gave the employer

[3] S. 2970, S. 1390, as introduced and S. 1400.

rights to cross-examine witnesses and present its evidence to challenge reinstatement demands.[4]

The Congressional Record is silent as to why, after five years of careful consideration, the legislation was suddenly changed to delete due process procedures when S. 3044 was passed by the Senate on December 21, 1982. For the first time, a requirement of "preliminary reinstatement" instead of a "proposed order" appealable to the Secretary of Labor was inserted in the bill.

However, when this provision as rewritten was accepted in the Conference between the Senate and the House later on the same day, it is evident the Conferees thought they were accepting and voting on the previous provision with its due process procedures. The Conference Report on H.R. 6211, which became the bill enacted by both Chambers, undebatably describes the statutory provision which contained the "proposed order" procedure *not* the "preliminary reinstatement" procedure inserted inexplicably in the statute:

> Subsection (c) provides the procedure an employee may follow if the employee believes he has been discriminated against, disciplined or discharged in violation of subsection (a) or (b). An employee may file a complaint within 180 days after the alleged violation occurs with the Secretary of Labor. The Secretary of Labor is then required to conduct an investigation within 60 days of receipt of a complaint and report his findings and conclusions to the affected parties. If the Secretary of Labor determines that there is reasonable cause to believe that the complaint has merit, he shall notify the complainant and the person alleged to have committed the violation. Thereafter, either the person alleged to have committed the violation or the complainant may, *within 30 days file objections to the proposed order and request a hearing on record.* Where a hearing is not timely requested, the Secretary shall issue a final order not subject to judicial review . . . [Emphasis provided.]

128 Cong. Rec. H10826 (daily ed. December 21, 1982).

[4] No other version of § 405 was introduced between December 7, 1982 and December 21, 1982, the date S. 3044 passed the Senate. The section-by-section analysis submitted by Senator Baker on December 14, 1982 and quoted by the Government in its brief (Gov't. Br. p. 33) was also in support of the original provision requiring the Secretary to hold a hearing on a *proposed* order prior to reinstatement. 128 Cong. Rec. S14648 (daily ed. Dec. 14, 1982).

That Congress intended to include employer due process protection in the "Protection of Employees" provisions embodied in § 405 is clear. Since the statute can fairly be read to include such constitutionally-mandated protection for employers, the District Court was correct in enjoining appellants from issuing a preliminary reinstatement order prior to holding an evidentiary hearing.

This Court has stated that as a "cardinal principle," it will "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982), (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "An Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979); see also *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804). Before determining that the statute violates the Constitution, "there must be present the affirmative intention of the Congress clearly expressed" that Congress intended the statute to be so applied. *N.L.R.B. v. Catholic Bishop of Chicago, supra* at 500.

In attempting to determine Congress' intent, this Court first looks to the statute. *Greyhound Corp. v. Mt. Hood*, 437 U.S. 322, 330 (1978). In this case, the statute itself

is silent on the issue of a pre-reinstatement hearing. Where there is no clear expression of the intention of Congress in the statute, the Court must examine the legislative history of the Act to determine the Congressional intent. *N.L.R.B. v. Catholic Bishop of Chicago*, *supra*, at 504; *Rose v. Lundy*, 455 U.S. 509 (1982).

As illustrated above, Congress has consistently expressed an intent to provide employers with some form of pre-reinstatement hearing in § 405 proceedings. By relying on this legislative history, the Court may avoid resolving the Constitutional issue and affirm the decision of the District Court.

II. The Other Major Federal Statutes Which Contain Employee Protection Provisions All Require Some Form of Due Process Prior To Reinstatement.

The Secretary of Labor's interpretation of § 405 of the STAA constitutes an anomaly when compared with the other major federal statutes containing employee protection provisions and should not be allowed to stand.

Fourteen major acts of Congress provide for employee protection when bringing law violations to public attention. All require that due process procedures be followed before an employee may be reinstated and compensated for wrongful discharge. Under eight statutes, an agency hearing pursuant to the Administrative Procedures Act, 5 U.S.C. § 554, must be conducted before the employee may be ordered reinstated.[5] Five other federal laws require the employee or the agency to bring an action in federal district court to enforce the employee protection

[5] National Labor Relations Act, 29 U.S.C. § 160; Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610; Toxic Substance Control Act, 15 U.S.C. § 2622; Federal Water Pollution Control Act, 33 U.S.C., § 1367; Energy Reorganization Act, 42 U.S.C. § 5851; Solid Waste Disposal Act, 42 U.S.C. § 6971; Clean Air Act, 42 U.S.C. § 7622; and Surface Mining Act, 30 U.S.C. § 1293.

provisions of these enactments, and again, only after a trial on the merits, may the employee's discharge or disciplinary action be reversed.[6]

Perhaps the statute most analogous to the one at issue here is the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. Pursuant to this law, a miner who believes he or she has been wrongfully discharged may file a complaint with the Secretary of Labor. Upon receiving the complaint, the Secretary, after forwarding a copy to the employer, must investigate the matter to determine whether the case was frivolously brought. If the Secretary finds that the complaint is not frivolous, the employee must be immediately reinstated pending final order on the complaint 30 U.S.C. § 815(c)(2). The statute makes no explicit provision for a hearing prior to the issuance of the temporary reinstatement order.

Pursuant to this statute, the Federal Mine Safety and Health Review Commission promulgated Rule 44, 29 C.F.R. Part 2700.44, which provided for a temporary reinstatement order on the basis of an investigator's recommendation. The employer could then request a hearing to contest the order, which had to be held *within 5 days.*

In *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *reh'g denied*, 781 F.2d 57 (6th Cir. 1986), the court held that the procedures adopted by the Commission were an unconstitutional deprivation of mine operators' due process rights in that they failed to insure any reasonable opportunity for at least some minimal evidentiary hearing *before* temporary reinstatement. Since the statute itself could be read in a constitutional manner, the court of appeals was able to limit its review to the unconstitutional rule.

[6] Fair Labor Standards Act, 29 U.S.C. §§ 215, 216; Employee Retirement Insurance Security Act, 29 U.S.C. §§ 1132, 1140; Occupational Safety and Health Act, 29 U.S.C. § 660; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-3, 5; and Safe Containers For International Cargo Act, 46 U.S.C. § 1506.

In short, § 405 would stand alone in denying employers due process rights provided in fourteen major federal statutes should the decision of the lower court be reversed. There simply is no valid rationale to distinguish this section from those others protecting similar rights that would somehow require a different result.

III. A Pre-Reinstatement Hearing Need Not Prolong A Wrongfully-Discharged Employee's Temporary Unemployment Or Present An Undue Administrative Burden To The Government.

Contrary to the assertions of the government (Gov't Br., p. 36) and *amicus curiae* for appellants, Teamsters for a Democratic Union (TDU Br., p. 8-9), a pre-reinstatement hearing need not prolong a wrongfully-discharged employee's unemployment. Under the current statute, the Secretary of Labor must conduct an investigation and make an initial determination whether there is reason to believe the complaint has merit within sixty days after receiving it. During this investigative period, the discharged employee may be out of work. From a practical viewpoint, there is no reason why some kind of an evidentiary hearing that comports with due process cannot be conducted within this time frame so that the complainant's unemployment, if it is unjustified, will not be prolonged. Correspondingly, the employee's incentive to bring safety complaints would not be deterred.

For example, under the revised Rule 44 implementing the Federal Mine Safety and Health Act of 1977, 29 C.F.R. 2700.44, published earlier this year, (51 Fed. Reg. 16024, April 30, 1986), the Secretary of Labor must hold an evidentiary hearing in response to a complaint *within 10 days* and make a determination whether the employee should be temporarily reinstated.[7] The employer is given the opportunity to cross-examine any witnesses and pre-

[7] In pertinent part, Rule 44 now reads:

> (b) Request for hearing. Within 10 days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint is not frivolously brought, he shall issue immediately an order of temporary reinstatement. If a hearing on the application is requested, the hearing shall be held within 10 days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

sent testimony and documentary evidence in support of its own position. Section 405 gives the Secretary six times as long—60 days—to conduct a similar hearing.

Nor would the Department of Labor's resources be overtaxed by having to conduct such hearings. Based on the following historical experience with the statute, since FY 1984, the Secretary has found merit on average in fewer than 50 complaints a year.[8] Thus, the number of instances where a hearing would be required prior to reinstatement (see column headed *"Found to Have Merit"*) are minimal:

	Complaints Pending as of Oct. 1 of Fis. Yr.	New Complaints	Withdrawn	Settled	*Found to Have Merit*	Dismissed
FY 1984	35	354	100	35	25	25
FY 1985	216	469	211	97	34	175
FY 1986 (as of June 30)	109	446	137	58	54	84

Source: OSHA Monthly Activity Reports, Sept. 1984; Sept. 1985; and June 1986.

[8] The OSHA Monthly Reports do not indicate how many "merit" determinations involve cases of discharge and how many concern other types of disciplinary or discriminatory actions not involving discharge.

Motor carriers have a material property interest in not being required to reinstate a disruptive employee. The government argues that the employer will not suffer an economic loss as a result of a preliminary reinstatement order because it will be receiving the employee's labors during the term of the reinstatement (Gov't. Br., p. 26). However, appellants ignore the disruptive nature of such a requirement and its impact on productivity, quality, and the morale of other workers.

In trucking, the forced rehiring, for example, of an incompetent or dangerously careless employee may present a possible safety hazard to other employees and the general public—the motor carrier employer must bear the responsibility and liability of having such an employee operating its trucks, and the public must bear the risk of having him on the highways.[9]

Nor is the period of reinstatement necessarily short. Under the statute, there is *no* time limit within which the Secretary must hold a hearing after the preliminary reinstatement order is issued, and the Secretary has 120 days *after* the hearing to issue a final decision, 49 U.S.C. § 2305(c)(2). Thus, a carrier could be forced to reemploy an unsatisfactory employee for a minimum of six months to over a year.

The disruptive cost of reinstating such employees has been recognized by this Court in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) wherein Justice Powell in a concurring opinion stated:

[9] Three recent studies indicate that 95% of truck accidents are caused by driver error, rather than vehicle defects: *Study of Car/Truck Crashes in the United States*, Univ. of Mich. Highway Safety Research Institute (May 1982); *Accidents of Motor Carriers of Property 1984*; U.S. Dept. of Transportation (May 1986); and *Identification of Preventable Commercial Accidents and Their Causes*, Mandex, Inc., on behalf of Federal Highway Administration (Sept. 1985).

> Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.

See also Southern Ohio Coal Co., supra at 703, where the court found "compelling" the employer's interest in "not being required to employ in a sensitive position [section foreman] a man whom it has discharged." The operation of an eighteen wheel truck on the nation's highways must be considered such a "sensitive position."

In comparing the cost of conducting the constitutionally required evidentiary hearing, to the substantial cost to employers of having to reinstate an unsatisfactory employee, we believe the equitable as well as the legal balance weighs in favor of requiring a pre-reinstatement hearing.

CONCLUSION

ATA respectfully urges that the decision and order of the District Court be affirmed.

Respectfully submitted,

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